(15)

No. 93-1318-CFX
Status: GRANTED

Title: Interstate Commerce Commission, Petitioner
v.
Transcon Lines, et al.

Docketed:
February 16, 1994

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Gumport,Leonard L., Reynolds,Mary Kay, Berger,Richard S., Mann,Kim D., Augello,William J.

1-14-94 ext til 2-23-94, J. O'Connor, CITED.

Entry	Date	Note	Proceedings and Orders
1	Jan 13 1994	G	Application (A93-572) to extend the time to file a petition for a writ of certiorari from January 24, 1994 to February 23, 1994, submitted to Justice O'Connor.
2	Jan 14 1994		Application (A93-572) granted by Justice O'Connor extending the time to file until February 23, 1994.
3	Feb 16 1994	G	Petition for writ of certiorari filed.
4	Mar 18 1994		Brief amici curiae of National Small Shipments Traffic Conference, Inc., et al. filed.
5	Mar 18 1994		Brief amicus curiae of International Brotherhood of Teamsters filed.
6	Mar 18 1994		Brief of respondents Transcon Lines, et al. in opposition filed.
7	Mar 23 1994		DISTRIBUTED. April 15, 1994 (Page 2)
8	Apr 4 1994	X	Reply brief of petitioner ICC filed.
9	Apr 18 1994		Petition GRANTED.
			**********
10	May 2 1994	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	May 23 1994		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	May 31 1994		Brief of petitioner filed.
14	Jun 1 1994		Brief amicus curiae of Transportation Claims & Prevention Council filed.
13	Jun 2 1994		Brief amici curiae of Health and Personal Care Distribution Conference, et al. filed.
15	Jun 30 1994		Brief amicus curiae of International Brotherhood of Teamsters filed.
16	Jul 1 1994		Brief amicus curiae of Lloyd T. Whitaker filed.
17	Jul 5 1994		Brief of respondents Transcon Lines, et al. filed.
18	Aug 5 1994		CIRCULATED.
19	Aug 5 1994	X	Reply brief of petitioner filed.
20	Aug 15 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit (BOX)
21	Aug 15 1994	X	Supplemental brief of respondents filed.
23	Aug 24 1994		Record filed.
		*	Original record proceedings United States District Court for the Central District of California (BOX)

No. 93-1318-CFX

Entry	Date	Note	Proceedings and Orders
22	Aug 25 1994		SET FOR ARGUMENT TUESDAY, NOVEMBER 1, 1994. (2ND CASE).
24	Oct 31 1994		Letter from the Solicitor General received and distributed.
25	Oct 31 1994		LODGING consisting of a copy of Public Law 103-311 (TIRRA), together with a policy statement on TIRRA (Ex Parte) No. MC-222 issued by ICC, 10/24/94 and a a copy of ICC Regulatory Responsibilities, 10/25/94.
26	Nov 1 1994		ARGUED.
27	Nov 3 1994	G	Motion of respondents for leave to file a supplemental brief after argument filed.
28	Nov 14 1994		Motion of respondents for leave to file a supplemental brief after argument GRANTED.

2-16-94

No. 93-1318

In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under the filed rate doctrine and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), the Interstate Commerce Commission (ICC) is barred from obtaining an injunction against a motor carrier's attempt to collect past-due freight charges in violation of the ICC's credit regulations, notwithstanding the ICC's express authority to regulate credit, 49 U.S.C. 10743(b), and to "bring a civil action * * * to enforce" the Interstate Commerce Act and regulations thereunder, 49 U.S.C. 11702(a)(5).

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Interstate Commerce Commission; Transcon Lines; and Leonard Gumport, Trustee.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement	2
Reasons for granting the petition	9
Conclusion	19
Appendix A	1a
Appendix B	10a
Appendix C	41a
Appendix D	42a
Appendix E	44a
Appendix F	71a
Appendix G	73a
Appendix H	74a

TABLE OF AUTHORITIES

Cases:

Adams v. *Mills*, 286 U.S. 397 (1932)	15
Gumport v. *ICC*, 113 S. Ct. 2987 (1993)	7
Hewitt-Robins Inc. v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962)	15
ICC v. *Transcon Lines*, 113 S. Ct. 2955 (1993)	3, 9
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	2, 9, 10, 11, 15, 16
Reiter v. *Cooper*, 113 S. Ct. 1213 (1993)	3, 8, 9, 10, 11, 13, 15, 19
Southern Pacific Transp. Co. v. *Commercial Metals Co.*, 456 U.S. 336 (1982)	2, 6, 8, 10, 14, 15, 19

Statutes and regulations:

Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*	2
49 U.S.C. 10743	11, 74a
49 U.S.C. 10743(a)	4, 74a

Statutes and regulations—Continued: Page

49 U.S.C. 10743(b)(1) 4, 74a
49 U.S.C. 10761 ..... 3, 12, 74a
49 U.S.C. 10762(a)(1) 3, 12, 75a
49 U.S.C. 11702(a)(5) 2, 11, 12, 17, 77a-78a
49 U.S.C. 11705(b)(3) 10
Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 18
49 C.F.R. Pt. 1320 ..... 2, 4, 80a
Section 1320.2(b) 4, 81a
Section 1320.2(c) 4, 82a
Section 1320.2(d) 4, 82a
Section 1320.2(e)(3) 5, 82a
Section 1320.2(g) 5, 83a
Section 1320.2(g)(1) 5, 83a
Section 1320.2(g)(1)(i) 5, 83a
Section 1320.2(g)(1)(ii) 5, 83a-84a
Section 1320.2(g)(2)(i) 5, 84a
Section 1320.2(g)(2)(iii) 6, 7, 16, 84a
Section 1320.2(g)(2)(vi) 5, 7, 84a-85a
Section 1320.3(a)(2) 4, 85a
Section 1320.3(b)(1) 4, 85a
Section 1320.3(c) 5, 7, 86a

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission (ICC), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand (App., *infra*, 1a-9a) is reported at 9 F.3d 64. The prior opinion of the court of appeals (App., *infra*, 14a-43a) and an opinion concurring in the court of appeals' prior denial of rehearing and rehearing en banc (App., *infra*, 12a-14a) are reported at 990 F.2d 1503. The opinion of the district court (App., *infra*, 44a-70a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1993. On January 14, 1994, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and the ICC's credit regulations, 49 C.F.R. Pt. 1320, are set forth in an appendix (App., *infra*, 74a-87a).

STATEMENT

This case, which comes before the Court for a second time, involves a civil action filed by the ICC to enjoin respondents, Transcon Lines and its trustee in bankruptcy, from attempting to collect additional charges from shippers in violation of the ICC's credit regulations. In a prior opinion in this case, the court of appeals held, in reliance on *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), that notwithstanding the ICC's express authority to "bring a civil action * * * to enforce" the Interstate Commerce Act (Act), 49 U.S.C. 11702(a)(5), and regulations thereunder, and notwithstanding the ICC's "power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations," *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 349 (1982), Transcon could pursue its collection actions in violation of the ICC's credit regulations. On the ICC's petition for a writ

of certiorari, this Court granted certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of the Court's intervening decision in *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993). *ICC* v. *Transcon Lines*, 113 S. Ct. 2955 (1993). On remand, the court of appeals adhered to its original reading of *Maislin* and again held that the ICC could not bring this injunction action to enforce its credit regulations. App., *infra*, 1a-9a.

1. Transcon Lines was once the twelfth largest motor carrier in the United States. Pursuant to the Act's requirement that interstate motor common carriers must publish their shipping rates in tariffs filed with the ICC, 49 U.S.C. 10761, 10762(a)(1), Transcon filed tariffs with the ICC that set forth its rates. One of Transcon's tariffs set forth "discount" rates that were expressed as percentages of higher "bureau" tariff rates.[1] Transcon also had a "rules" tariff that contained a "loss-of-discount" provision. That provision stated that discounts "shall apply only when tariff charges are paid within 90 calendar days from the date of shipment," and indicated that payment within that period was a "condition precedent" to application of the discount.[2] App., *infra*, 15a, 17a-18a.

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[1] A carrier typically files tariffs containing tiers of rates, from relatively high, collectively set bureau rates to a variety of lower discount rates for particular traffic and markets. In this case, for example, one page of Transcon's discount tariff provides discount rates ranging from 20 to 55 percent of the bureau tariff rates. Vol. I, Resp. C.A. E.R. 41 (TCON 625, 9th Revised Page 587).

[2] The provision stated (Vol. I, Resp. C.A. E.R. 41 (TCON 103-A, Item 210)):

The use of Transcon's "loss-of-discount" provision is subject to the Act's scheme for regulating the extension of credit. The Act requires that common carriers must retain possession of property until the shipper pays the full filed rate, 49 U.S.C. 10743(a), unless the ICC has promulgated regulations that permit carriers to "give up possession at destination of property transported * * * before [full] payment." 49 U.S.C. 10743(b)(1). The ICC has promulgated detailed regulations that provide the exclusive means for a carrier to release freight before payment is made. See 49 C.F.R. Pt. 1320; App., *infra*, 80a-87a. Under those regulations, a carrier may release goods without payment for a credit period not to exceed 30 days.[3] If the shipper fails to pay the freight charges within the credit period, the carrier may

1. [D]iscounts * * * shall apply when tariff charges are paid within 90 calendar days from date of shipment.
2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 CFR 1322 [*sic*; 1320.2]. This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

[3] A carrier must generally present a freight bill for payment within seven days, 49 C.F.R. 1320.3(a)(2) and (b)(1), and "[t]he credit period shall begin on the day following presentation of the freight bill." 49 C.F.R. 1320.2(b). The standard credit period is 15 days, 49 C.F.R. 1320.2(c), but the ICC's rules permit a carrier to provide different standard credit periods in its tariff rules. 49 C.F.R. 1320.2(d). "Such credit periods," however, "shall not be longer than 30 calendar days." *Ibid.*

assess liquidated damages, in addition to the freight charges, to compensate it for the cost of collection.[4] The ICC's rules require the liquidated-damages provision to be contained in a tariff filing and permit the damages to be measured in either of two ways: (1) as a "separate additional charge" (stated as a flat amount or as a percentage of the freight bill), 49 C.F.R. 1320.2(g)(1)(i), or (2) as "the full, nondiscounted rate instead of the discounted rate otherwise applicable." 49 C.F.R. 1320.2(g)(1)(ii). The latter provision, a "loss-of-discount" provision, was employed by Transcon.

The ICC's regulations also place mandatory conditions on efforts by carriers to collect such liquidated damages, several of which are relevant here. First, the loss-of-discount provision must be set forth in the carrier's tariff. 49 C.F.R. 1320.2(g)(1) and (2)(i). Second, the carrier must specifically state the liquidated damages that apply to late payments in the original bill for the shipment. 49 C.F.R. 1320.3(c). Third, the carrier must issue a revised freight bill that includes the liquidated-damages charge within 90 days after the expiration of the authorized credit period. 49 C.F.R. 1320 2(g)(2)(vi). Fourth, because aggregate rebillings afford substantial cost-savings to a carrier, the carrier may apply liquidated damages "only to the nonpayment of original, separate and independent freight bills and shall

[4] See 49 C.F.R. 1320.2(g). The carrier may also assess separate interest charges to a delinquent shipper under 49 C.F.R. 1320.2(e)(3). Interest compensates a carrier for the loss of the use of the money during the delinquency period and ensures that delinquent shippers do not enjoy an advantage over shippers who make timely payments.

not apply [them] to aggregate *balance-due* claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent." 49 C.F.R. 1320.2(g)(2)(iii).

A shipper cannot raise the carrier's violation of the credit regulations in defense of an action to collect the filed rate. *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982). The ICC, however, has "ample authority to police the credit practices of carriers and thereby to deter improper practices." *Id.* at 349. In particular, the ICC has the discretion to frame appropriate "remedies for a carrier's violations of the [credit] regulations," *id.* at 352, and the "power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations," *id.* at 349.

2. After Transcon filed for bankruptcy, its trustee engaged a rate auditor, collection agency, and collection attorney to review the carrier's tariffs and accounts. As a result of those efforts, respondents sought to collect from shippers approximately $8 million in unpaid freight charges and approximately $15 million in additional charges. App., *infra*, 16a. The additional charges were based on claims that the shippers had not paid, within 90 days after shipment, the amount the trustee now claims should have been charged, and that the shippers were therefore not entitled to the discount rate. In such instances, the trustee sought to collect the higher bureau rate. *Id.* at 30a.

The ICC brought this action in district court to enjoin respondents from applying the loss-of-discount credit provision to shippers in violation of ICC regulations. Specifically, the ICC alleged (and there is no dispute) that Transcon's original bills did not

advise shippers of the consequence of late payment, as required by 49 C.F.R. 1320.3(c); revised bills were not issued until several years after the 90-day period provided in 49 C.F.R. 1320.2(g)(2)(vi); and the trustee sought to apply the loss-of-discount provision on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii). The ICC requested an injunction that would prohibit respondents from asserting claims that violated those requirements. App., *infra*, 14a-16a.

The district court granted summary judgment for respondents. The court held that because Transcon's loss-of-discount provision was found in its filed tariff, the ICC's regulations could not be applied to prevent enforcement of it. The court concluded that the ICC's regulations, as applied here, were not "valid as against the filed rate doctrine."[5] App., *infra*, 62a (Tr. 24).

3. The court of appeals affirmed in relevant part.[6] App., *infra*, 14a-40a. The court recognized that Transcon's trustee stands in the shoes of the carrier and is therefore subject to the ICC's authority to "bring a civil action of enforcement against the carrier's estate, 49 U.S.C. § 11702." *Id.* at 26a. The

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[5] The court also accepted the trustee's argument that Transcon's discount tariffs were invalid because the tariffs identified shippers by account code rather than by name. App., *infra*, 58a-60a (Tr. 19-21), 67a (Tr. 31).

[6] The court of appeals reversed the district court's holding with respect to shipper account codes (see note 5, *supra*) on the ground that the trustee lacked standing to challenge the validity of the carrier's own tariffs. App., *infra*, 34a-40a. This Court denied the trustee's petition for a writ of certiorari seeking review of that holding, *Gumport* v. *ICC*, 113 S. Ct. 2987 (1993), and it is no longer at issue.

court also recognized that the district court had erred in holding that the ICC's credit regulations were simply invalid. *Id.* at 31a, 34a, 40a. Nevertheless, the court of appeals concluded that the ICC could not enjoin Transcon from enforcing its loss-of-discount provision in violation of ICC credit regulations "because the Commission's regulations cannot be enforced in this way to undercut the filed rate." *Id.* at 34a. The court explained (*id.* at 32a):

> Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then has no greater force than the policy rejected in *Maislin*. Although the Act authorizes the ICC to regulate carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

4. The government filed a petition for a writ of certiorari, arguing that the court of appeals' holding conflicted with the principle of *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993), in which the Court held that the filed rate doctrine does not preclude the avoidance of the filed rate based on claims that are specifically authorized by the Interstate Commerce Act. The petition suggested that the court of appeals should be directed to reexamine the case in light of *Reiter*. The petition also suggested, in the alternative, that the Court should consider summary reversal in view of this Court's prior recognition in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, *supra*, that

the ICC may enforce its credit regulations through an injunction. This Court granted certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of *Reiter*. *ICC* v. *Transcon Lines*, 113 S. Ct. 2955 (1993).

On remand, the court of appeals concluded that *Reiter* did not require revision of its analysis. App., *infra*, 1a-9a. The court read *Reiter* as limited to a holding that claims specifically accorded to *shippers* by the Act are not trumped by the filed rate doctrine. *Id.* at 4a. Even if the same principle applied to claims specifically accorded to *the ICC*, the court stated, it would still have to determine "which of [the] two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions." *Id.* at 5a. Relying on this Court's statement in *Maislin*, 497 U.S. at 132, that the filed rate doctrine is "utterly central to the administration of the [Interstate Commerce] Act," the court gave priority to the filed rate doctrine. App., *infra*, 8a. The court thus held, as it had previously, that because Transcon had stated its credit terms in its tariff, the filed rate doctrine precludes the ICC from enforcing its credit regulations via an injunction. *Id.* at 8a-9a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision on remand continues to conflict with this Court's cases. In *Reiter* v. *Cooper*, 113 S. Ct. at 1219, this Court held that the filed rate doctrine "does *not* preclude avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." Despite that language, the court of appeals held that the filed rate doctrine supplants and super-

sedes the ICC's express authority accorded by the Interstate Commerce Act to enforce its duly authorized regulations. That holding is irreconcilable with *Reiter*. The court of appeals' holding also conflicts with the Court's recognition in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. at 349, that the ICC has "the power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations." Finally, the court's decision seriously misapplies *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, *supra*, by finding that the denial of liquidated damages to respondents is tantamount to sanctioning the use of an unfiled, negotiated rate.

Because the court's decision departs from decisions of this Court, and because it impairs the ICC's statutory mandate to enforce the Act, this Court's intervention is again required. In our view, summary correction of the court of appeals' error is warranted.

1. In *Reiter* v. *Cooper*, *supra*, the Court held that a shipper may assert as a counterclaim in an undercharge action the right of reparations for unreasonable rates provided in 49 U.S.C. 11705(b)(3). The Court rejected the contention that "the so-called 'filed rate doctrine' gives [the carrier and its trustee] absolute entitlement to judgment on their undercharge claims, without defense or counterclaim." 113 S. Ct. at 1219. The Court explained:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. * * * It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself.

Ibid. Applying that principle, the Court concluded that the right of shippers to assert "the reparations rights explicitly conferred by § 11705(b)(3)" is not defeated by a claim that the filed rate doctrine bars interference with collection of the filed rate. *Ibid.*

The ICC's right to bring an injunction action in this case directly follows from the principle established in *Reiter*. The ICC has express authority to "bring a civil action * * * to enforce [the Interstate Commerce Act] * * * or a regulation or order of the Commission * * * when violated by a [motor] carrier providing transportation subject to the jurisdiction of the Commission." 49 U.S.C. 11702(a)(5); App., *infra*, 77a-78a. The ICC's action in this case enforces regulations of the Commission that govern when a carrier may release goods without payment and collect damages for late payment. Those regulations are authorized by the specific statutory prohibition against credit transactions except in accordance with ICC regulations. 49 U.S.C. 10743. In *Reiter*, the Court held that the filed rate doctrine does not trump "the reparations rights explicitly conferred" by the Act, 113 S. Ct. at 1219; here, by identical reasoning, the filed rate doctrine does not trump the ICC's credit regulations and the agency's enforcement rights explicitly conferred by the Act.[7]

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[7] The Court's holding in *Reiter* was not an innovation. *Maislin* itself recognized that the filed rate doctrine had to be harmonized with other provisions in the Act. The Court noted that the filed rate doctrine "contains an important caveat: [t]he filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 497 U.S. at 128. Under the same

The court of appeals, in response to the Court's direction to reconsider this case in light of *Reiter*, purported to distinguish *Reiter* by noting that it involved the reparations rights of shippers, and this case involves the enforcement rights of the ICC. App., *infra*, 4a. That distinction between the cases has no relevance, however, to the principle of *Reiter*: the filed rate doctrine does not preclude the assertion of claims authorized by the Act itself. The fact that the ICC rather than a shipper is enforcing statutory rights provides no basis whatsoever for the court of appeals' view that the court was entitled to balance the filed rate doctrine against the statutory rights conferred on the ICC, and to determine "which provision should be given priority." App., *infra*, 5a. To the contrary, Congress has already struck that balance in the provisions of the Act. Carriers are bound to observe the filed rate, 49 U.S.C. 10761, 10762(a)(1), but Congress gave the ICC express authority to enforce the Act when carriers have violated statutory or regulatory requirements. 49 U.S.C. 11702(a)(5). The purpose of the ICC's action here is to remedy such statutory and regulatory violations.[8] The filed

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principle, the filed rate is not enforceable if the ICC finds that the carrier is violating applicable credit regulations and seeks to enjoin that conduct.

[8] The court of appeals acknowledged in its prior opinion in this case that "Transcon did not comply with the regulation requiring the notice [of potential liquidated damages] in the original bill," and its trustee "has not complied with regulations requiring new, individual non-aggregated bills." App., *infra*, 30a-31a. It is also evident that the respondents violated the requirement of resubmitting bills within 90 days of the authorized credit period, but instead rebilled unsuspecting shippers long after the shipments involved. *Id.* at 16a, 30a.

rate doctrine is not a reason to preclude that remedy. As this Court explained in *Reiter*, the filed rate doctrine yields to "claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." 113 S. Ct. at 1219.

A clear indication that the court of appeals departed from *Reiter*, with the effect of negating Congress's determination to equip the ICC with civil enforcement authority, is the way in which the court decided "which of [the] two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions." App., *infra*, 5a. The court of appeals surmised that empowering the ICC to enjoin respondents' collection action "would permit an end-run around the filed rate doctrine," because a shipper and carrier could negotiate a secret discount from the filed rate and then "purposely violate various credit regulations." *Id.* at 6a. "If the ICC goes along" with the subterfuge and "looks the other way," the court asserted, "then the filed rate doctrine would be gutted," because "the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper." *Ibid.*

That overt distrust of the ICC is at odds with Congress's decision to charge the Commission with responsibility to enforce the Act, and with this Court's recognition, see pp. 14-15, *infra*, of the pivotal role that the ICC plays in enforcing the credit regulations in particular. Under the court of appeals' balancing test, courts are free to dilute or obstruct the enforcement powers that Congress gave to the ICC because of a suspicion that the agency might "look[] the other

way" at "illegal bargain[s]." Under *Reiter*, however, neither the filed rate doctrine nor the misgivings of courts can justify the nullification of statutory rights that Congress specifically provided. That principle applies with perhaps its greatest force to the enforcement powers that Congress vested in the ICC.

2. The court of appeals' holding also conflicts with *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, *supra*. In that case, the Court stated that "[t]he remedies for a carrier's violation of the [credit] regulations are best left to the ICC for such resolution as it thinks proper," 456 U.S. at 352, and such remedies include "the power to seek a federal-court injunction requiring a carrier to comply with the regulations." *Id.* at 349. Here, the ICC exercised the power acknowledged in *Commercial Metals*, but the court of appeals frustrated it. While purporting not to disturb the ICC's power to enforce its regulations, the court has effectively vitiated it.[9]

In its opinion on remand, the court of appeals stated that the ICC's "concern" that it would be unable to enforce the credit regulations "is exaggerated," because the ICC could invoke other prospective remedies and could impose fines for knowing violations of ICC orders. App., *infra*, 6a-7a. This Court, however, emphasized that the ICC's remedies include "the power to seek a federal-court injunction," *Commercial Metals*, 456 U.S. at 349, and the court of appeals barred the ICC from using an in-

[9] *Commercial Metals* ruled that courts may not create an implied equitable defense on behalf of shippers that would permit them to resist payment through the ad hoc assertion of credit-regulation defenses. In light of the court of appeals' decision, neither the courts nor the Commission can remedy respondents' violations of the credit regulations.

junction to enforce its credit regulations against a bankrupt carrier whose trustee is systematically violating the ICC's credit regulations. While the court of appeals mentioned remedies against operating carriers (which are inapplicable here) and raised the possibility of fines (which presuppose a continuing violation), the most logical and effective remedy for the ICC is to deny the trustee the power to exact additional charges from shippers, when those charges are asserted in violation of the ICC's credit regulations. As this Court stated in *Commercial Metals*, it is for the ICC, not the courts, to select the appropriate remedy for credit-regulation violations. 456 U.S. at 352.

3. Not only does the court of appeals' holding conflict with *Reiter* and *Commercial Metals*, it also misapplies the basic teaching of *Maislin* itself. *Maislin* dealt with a policy that permitted the enforcement of unfiled, negotiated rates; this Court invalidated that policy "because it would 'rende[r] nugatory' the specific command of [49 U.S.C.] § 10761 that the carrier charge the filed rate." *Reiter* v. *Cooper*, 113 S. Ct. at 1216; *Maislin*, 497 U.S. at 133. *Maislin* does not bar the ICC from remedying a violation by "requir[ing] only the application of a different filed rate * * * rather than departure from the tariff schedule entirely." 497 U.S. at 129 n.11 (citing *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86 (1962), and *Adams* v. *Mills*, 286 U.S. 397, 412 (1932)). At most, that would be the effect of the ICC's requested injunction here.

The injunction requested by the ICC would not foreclose the carrier from charging a filed rate. Respondents are entitled to collect the filed *discount*

rate—the rate due upon delivery of the goods. Respondents can also collect interest charges from late-paying shippers, in order to be made whole for any delay in payment. The effect of the requested injunction is simply to prevent respondents from seeking additional collection charges that clearly violate the credit regulations. To hold that *Maislin* precludes the ICC from seeking that remedy, as the court of appeals did, is an unwarranted extension of that case.

Indeed, as we explained in our prior petition in this case (92-1547 Pet. 11-12), the ICC's requested injunction would not even require the application of a "different filed rate." *Maislin*, 497 U.S. at 129 n.11. The higher rate that the trustee claims under Transcon's loss-of-discount provision is a credit term. It is available only because ICC regulations authorize carriers to release goods without payment and then to compute liquidated damages for late payment by reference to non-discounted tariff rates.[10] See pp. 4-5, *supra*. Liquidated damages, however, are not the filed rate. Accordingly, by seeking to enjoin the liquidated-damages claims in this case, the ICC is not interfering with collection of *any* filed rate.[11]

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[10] Liquidated damages are designed to compensate a carrier for collection costs in credit transactions. Here, however, those additional costs are not justified because respondents have engaged in aggregate rebilling of shippers and have realized substantial economies of scale by doing so. In recognition of such cost savings, the ICC's rules specifically prohibit the imposition of liquidated damages when a carrier submits aggregate rebillings. 49 C.F.R. 1320.2(g)(2)(iii).

[11] This Court is currently considering an issue involving the filed rate doctrine in *Security Services, Inc.* v. *K Mart Corp.*, No. 93-284 (to be argued Feb. 28, 1994). In that case, the issue is whether a carrier may collect charges based on a tariff

4. We previously petitioned for certiorari in this case not only because the court of appeals' decision is incorrect and conflicts with this Court's cases, but also because it works a significant disruption of the ICC's program to enforce the regulatory requirements of the Act. The upsurge of collection actions by insolvent motor carriers in recent years has revealed widespread disregard of the Act by motor carriers. In response, the ICC has stepped up its efforts to

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that contains only one of two components necessary to establish a mileage-based rate, notwithstanding the ICC's interpretation of its tariff filing rules as rendering such a tariff void as a matter of law. The court of appeals in this case appeared to find support for its holding in the decisions of courts of appeals that reject the ICC's position in the mileage-guide cases. See App., *infra*, 7a-8a (citing cases and characterizing them as rejecting "the ICC's attempt to argue that rates filed were void because they did not follow proper filing regulations"). None of the cases involving the mileage-guide dispute, however, involves the ICC's enforcement authority under 49 U.S.C. 11702(a)(5).

In our view, the issue in this case involves different principles than are involved in *Security Services*. The central question in that case is whether there is a filed rate at all, given the carrier's failure to participate in a tariff that is needed to compute its rates. Our amicus brief in *Security Services* argues that the filed rate doctrine requires a finding that there is no filed rate in those circumstances, and even if there is one, the ICC has the power to reject it retroactively. Here, the central question is whether a trustee's collection action, based on what purports to be a filed rate but prosecuted in violation of ICC regulations, may trump the ICC's explicitly conferred enforcement authority to bring a civil action to remedy violations of the Act or regulations thereunder. Despite those distinctions, it is possible that the Court's decision in *Security Services* would be relevant to the resolution of this case. Accordingly, the Court may wish to hold the petition in this case pending its decision in *Security Services*.

ensure compliance with the Act. As the court of appeals noted in its prior opinion in this case, App., *infra*, 21a-25a, the ICC's Office of Compliance and Consumer Assistance issued policy guidelines in 1991 articulating the ICC's intent to take a more aggressive role in enforcing the tariff filing requirements. Observing that "it is important that motor carriers and the shipping public continue to be sensitive to the requirement for common carriers to file their rates and adhere to them," the guidelines stated that the Office "will consider enforcement action where feasible against carriers who fail to assess and collect filed rates and shippers who knowingly receive such concessions and rebates." *Id.* at 24a. This case presents a different, but equally important, facet of the program to prevent carriers from disregarding the proper mechanisms for assessing charges under the Act, and to limit the impairment of shipper confidence in the regulated trucking industry that such violations have caused.[12]

The immediate result of the court of appeals' error is that respondents stand to collect millions of dollars from shippers, even though those charges were assessed in violation of the ICC's regulations. An at least

[12] Congress has also taken measures to prevent the exploitation of shippers by bankruptcy trustees for defunct motor carriers. In the Negotiated Rates Act of 1993, Pub. L. No 103-180, 107 Stat. 2044, Congress provided, among other things, that certain shippers who are required to make undercharge payments to bankrupt carriers may satisfy those claims by paying a prescribed percentage of the undercharge claims. The Negotiated Rates Act, however, does not address the issue in this case: whether a carrier may invoke the filed rate doctrine in opposing an ICC injunction action to bar the prosecution of undercharge claims brought in violation of the ICC's credit regulations.

equally significant consequence, however, is that the agency vested with authority to regulate motor carriers has been denied an effective means to carry out its enforcement responsibility. The court of appeals' holding in this case undermines the ICC's role in the statutory scheme; this Court's intervention is required to restore to the agency the enforcement authority that Congress provided.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed on the authority of *Reiter* v. *Cooper*, *supra*, and *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, *supra*.

Respectfully submitted.

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FEBRUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55036

D.C. No. CV-91-5036(Tx)

INTERSTATE COMMERCE COMMISSION,
PLAINTIFF-APPELLANT

v.

TRANSCON LINES, a corporation;
LEONARD L. GUMPORT, Chapter 7 Trustee,
DEFENDANTS-APPELLEES

On Remand from the United States Supreme Court

[Filed Oct. 26, 1993]

Before: ROBERT BOOCHEVER, WILLIAM A. NORRIS
JOHN T. NOONAN, JR., Circuit Judges.

ORDER

The Interstate Commerce Commission (the "ICC") sued Transcon Lines ("Transcon") and its bankruptcy trustee, Leonard Gumport (the "Trustee") from collecting filed freight charges. The ICC contended that the collection would violate its credit regulations. The district court granted summary judgment to the Trustee, and the ICC appealed. We affirmed in part, vacated in part, and remanded. *See ICC v. Transcon Lines*, 990 F.2d 1503 (9th Cir. 1993) (*"Transcon"*). Both the ICC and the Trustee then petitioned the Supreme Court for certiorari. The Trustee's petition was denied, the ICC's granted.[1]

In a summary reconsideration order issued June 14, 1993, the Supreme Court vacated the portion of this court's opinion that affirmed the district court, and remanded for cause for further consideration in light of *Reiter v. Cooper*, 113 S. Ct. 1213 (1993). We now consider the effect of *Reiter* on our previous opinion.[2]

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[1] This case's background is recited in the original opinion and will not be repeated here. *See Transcon*, 990 F.2d at 1507-11.

[2] We interpret the summary reconsideration order to mean that the Supreme Court believes *Reiter* is sufficiently analogous to warrant specific consideration by this court. The order does not necessarily mean that the Court has a view one way or the other on whether we should change our decision. Our duty is to reconsider in light of *Reiter*, but to exercise independent judgment in doing so. *See, e.g.*, Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795, 842 (1983); R.L. Stern et al., *Supreme Court Practice* (6th Cir. 1986) 280 (explaining that a summary reconsideration order means that "the lower court is being told to reconsider the entire case in light of the intervening precedent—which *may or may not* compel a different result") (emphasis added).

Reiter held that a shipper may assert "claims and defenses that are specifically accorded by the [Interstate Commerce Act ("ICA")] itself" even though it may not raise common law claims and defenses such as ignorance and estoppel. *Id.* at 1219. Reiter also held that, in response to a carrier's suit to collect the filed rate, the shipper may raise an ICA claim (in this case, a counterclaim) or defense in the very same action, pursuant to the Federal Rules of Civil Procedure. There is no requirement that the shipper "pay first" and litigate later, *see id.* at 1220, and the doctrine of "primary jurisdiction" does not preclude federal courts from hearing initially the claim or defense, *see id.* at 1221. The Court added that typically, when the carrier is solvent, the equities are in favor of separate judgments on the carrier's undercharge claim and the shipper's unreasonable rate claim. However, when the carrier is insolvent, the equities change, and separate judgments may not be warranted. *See id.*

Our task is to determine how *Reiter* affects our previous opinion in *Transcon*. In *Transcon* we held that the ICC may not enforce its credit regulations when doing so would render the filed rate doctrine nugatory. Our analysis relied heavily on *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), which affirmed the centrality of the filed rate doctrine to the ICA. *See id.* at 132. In *Maislin*, the Court rejected the ICC's characterization of a trustee's suit for undercharges as an unreasonable *practice* within the meaning of 49 U.S.C. § 10701(a). *Maislin*, however, explicitly stated that "[t]he issue of the reasonableness of the tariff *rates* is open for exploration on remand." 497 U.S. at 129, n.10 (emphasis added). *Reiter* addresses a problem of "timing

that has arisen out of that issue." *Reiter*, 113 S. Ct. at 1216.

According to the ICC, *Reiter* shows that this court read *Maislin* too broadly. The ICA specifically grants the ICC the authority to enforce its credit regulations. *See* 49 U.S.C.A. § 10743(b), § 11702(a) (West Supp. 1993). Thus the ICC argues that, under *Reiter*, the filed rate doctrine should not automatically be given priority over those regulations. Claiming that our opinion cripples its ability to enforce its credit regulations, the ICC asks us to reverse our decision in *Transcon*.

The ICC's argument is unwarranted by a plain reading of *Reiter*. By its clear language, *Reiter* did no more than address claims or defenses that the ICA specifically accorded to *shippers*. *See Reiter*, 113 S. Ct. at 1219. Unequivocal Supreme Court precedent holds, however, that the ICA does not confer on shippers the right to raise any claims or defenses arising from a carrier's violation of ICC credit regulations. *See Southern Pacific Transp. Co. v. Commercial Metals*, 456 U.S. 336, 352 (1982). As such, the holding in *Reiter* does not directly apply to the facts of this case.

Nonetheless, the ICC insists upon a capacious reading of *Reiter*. It argues that *Reiter*'s holding applies not only to statutory claims specifically accorded to shippers but also to the claims accorded to the ICC. The ICC explains that it is not asserting the rights of shippers; instead, it is enforcing, on its own, the credit regulations validly promulgated under the ICA. Furthermore, the ICC claims that the reason why the Supreme Court did not allow shippers to raise defenses based on credit regulation violations in *Commercial Metals* was that the Court believed that the

ICC had "ample authority to police the credit practices of carriers and thereby to deter improper practices." 456 U.S. at 349. The Court specifically noted that that authority included the power to seek federal court injunctions under the ICA. *See id.* Thus, the ICC claims that it is doing in *Transcon* just what *Commercial Metals* recognized that it could do: seek injunctions to enforce its credit regulations.

It is not necessary in this case to decide whether the ICC's reading—that *Reiter* applies not only to the claims of shippers but also to the claims of the ICC—is correct. For even if it is, the Commission has failed to demonstrate that our decision in *Transcon* was wrong. Under the ICC's reading of *Reiter*, the filed rate doctrine does not *necessarily* trump the ICC's credit regulation claims, as it would a shipper's equitable or common law defenses. The ICC therefore effectively asks us to decide which of two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions.

In deciding which provision should be given priority, we take guidance from the Supreme Court's affirmation in *Maislin* of the vital importance of the filed rate doctrine to the ICA. *See* 497 U.S. at 132. Our continued reliance on *Maislin* in resolving the conflict between the filed rate doctrine and the ICC's credit regulations is entirely appropriate. Indeed, since *Reiter* was handed down, two other circuits have reaffirmed *Maislin*'s recognition of the central importance of the filed rate doctrine. *See Brizendine v. Cotter & Co.*, 1993 WL 292348, at *3, 62 U.S.L.W. 2108 (7th Cir. Aug. 5, 1993); *Overland Express, Inc. v. ICC*, 996 F.2d 356, 358 (D.C. Cir. 1993).

With the teaching of *Maislin* in mind, we weigh the possible consequences of our decision. If we reverse and order summary judgment in favor of the ICC, then the ICC will be able to enjoin carriers from suing shippers for the filed rate even though the shipper itself could not rely upon the credit regulations as a defense or counterclaim. This result would permit an end-run around the filed rate doctrine. A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would purposely violate various credit regulations such as 49 C.F.R. 1320.3(c), which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only after a carrier goes bankrupt would the illegal discount be brought to light. But because the carrier intentionally failed to give notice to the shipper, the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper.

On the other hand, if we reaffirm the summary judgment awarded by the district court to the Trustee, the ICC claims that it will be powerless to enforce its credit regulations. In the ICC's parade-of-horribles, the carrier may flaunt the ICC's credit regulations with impunity because the shipper, under *Commercial Metals* and the ICC, under our holding in *Transcon*, can do nothing. But this concern is exaggerated.

The ICC has at its disposal a wide array of tools for enforcing its credit regulations. For example, the

ICC may issue cease-and-desist orders, *see Southern R. Co. v. United States*, 168 F. Supp. 29 (N.D. Ala. 1960), and seek federal injunctions, *see* 49 U.S.C.A. § 11702 (West Supp. 1993), to force carriers to obey its credit regulations. Upon violation of such orders and injunctions, the ICC can issue substantial fines of $5,000 per day for a knowing violation of its orders, *see* 49 U.S.C.A. § 11901(a) (West Supp. 1993), and request the enforcement aid of the judiciary. *See generally Commercial Metals*, 456 U.S. at 336 (listing enforcement tools of the ICC). The only thing that the ICC cannot do upon a violation of credit regulations is enjoin the carrier from suing the shipper for the filed rate. Since all other enforcement mechanisms remain, the claim that our opinion in *Transcon* eviscerates the ICC's power to enforce its credit regulations is overblown.

We recognize as well that we are in an unusual situation in which an agency has a record of challenging what the judiciary has interpreted to be the very heart of the statute that gave the agency life. In the past three years, the ICC has tried to undermine the primacy of the filed rate doctrine in various ways, to little success. In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the Supreme Court rejected the ICC's characterization of a trustee's suit for undercharges as an unreasonable *practice* within the meaning of 49 U.S.C. § 10701(a). In *Transcon*, we rejected the ICC's claim that suits for the filed rate violated its credit regulations. More recently, in *Security Services, Inc. v. P-Y Transportation, Inc.*, 1993 WL 325719, 62 U.S.L.W. 2161 (6th Cir. Aug. 30, 1993); *Brizendine v. Cotter & Co.*, 1993

WL 292348, 62 U.S.L.W. 2108 (7th Cir. Aug. 5, 1993); and *Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993), the Sixth, Seventh, and D.C. Circuits have rejected the ICC's attempt to argue that rates filed were void because they did not follow proper filing regulations. *But see Security Services, Inc. v. K Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3165 (August 23, 1993); *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993); *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir.), *cert. denied*, 1993 WL 233242 (1993); *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993) (all four cases upheld the ICC rule struck down in *Overland*). It appears that in this case, the ICC has seemed less interested in enforcing credit regulations for their own sake and more interested in avoiding what it considers to be another ill-advised application of the filed rate doctrine.

In sum, *Reiter*'s plain holding does not alter our result because the ICA does not specifically accord a claim or defense to the shipper on the basis of credit regulation violations. Even if capaciously read, *Reiter* at most requires us to resolve a clash of two statutory claims. In doing so we rely upon *Maislin*'s teaching that the filed rate doctrine is "utterly central to the administration of the [Interstate Commerce] Act." *Maislin*, 497 U.S. at 132 (internal quotations omitted).

Finally, a comparison of the competing policies embodied in the credit regulations and the filed rate doctrine does not alter our stance. Reversing our decision

would open an end-run around the filed rate doctrine, whereas affirming our decision would preserve the filed rate doctrine while leaving to the ICC sufficient authority to enforce its credit regulations by other means. Accordingly, the summary judgment in favor of the Trustee as to the collection of the bureau rate on overdue accounts is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55036

INTERSTATE COMMERCE COMMISSION,
PLAINTIFF-APPELLANT

v.

TRANSCON LINES, a corporation;
LEONARD L. GUMPORT, Chapter 7 Trustee,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Central District of California

Argued and Submitted April 8, 1992

Decided June 17, 1992

As Amended on Denial of Rehearing and
Rehearing En Banc April 5, 1993

Before: BOOCHEVER, NORRIS and NOONAN, Circuit Judges.

ORDER

The opinion as amended December 10, 1992 is hereby further amended by striking the amendment made December 10, 1992 and restoring the opinion, as follows:

In Slip op., p. 14392, paragraph 15 is hereby deleted and replaced by the following:

[Editor's Note: Amendment has been incorporated within published opinion.]

With this amendment, the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

The parties are reminded of Circuit Rule 4.6.b. Inasmuch as the opinion has been restorted to its October 23, 1992 form the court deems it highly improbable that the amendment affected by this order offers any ground for a petition for rehearing or rehearing en banc.

This court's order granting Appellant Interstate Commerce Commission's motion to stay the mandate expired on January 7, 1993. The Motion filed on March 8, 1993 of Appellant Interstate Commerce Commission to stay issuance of the mandate is **DENIED.**

The mandate shall issue forthwith.

WILLIAM A. NORRIS, Circuit Judge, concurring:

I concur in the order denying the petitions for rehearing and rejecting the suggestions for rehearing en banc because I agree that the Trustee has no standing to challenge the lawfulness of its own rates. I write separately to address a related point—the Trustee's attempt to establish standing by casting its challenge as one to the legality, rather than the lawfulness, of Transcon's rates. The Trustee contends that Transcon's coded tariff was not duly filed because neither the Commission nor the public could determine from the four corners of the tariff the identity of the shipper receiving each coded discount. As a result, the Trustee would have us strike the discount tariff and enforce as the filed rate the undiscounted bureau tariff, which was part of Transcon's filing and which suffers from no similar infirmity.

I confess to some misgivings about the legality of coded discounts and am pleased that the ICC has decided to address the issue. *See Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs*, I.C.C. Decision No. 40888 (Jan. 5, 1993). In this case, however, we cannot reach the question. For if coded rates are not duly filed and published rates, then to the extent Transcon's rates were coded, they were not filed. That is, for shipments subject to discount because payment was made within 90 days, Transcon had no rates on file, and thus no basis for collecting undercharges. *See Wonderoast, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C.2d 272, 278 (1992) (undercharges not available where no rates are filed).

In an attempt to establish an alternative filed rate for these shipments, the Trustee urges us to disaggregate Transcon's filing. He argues that, once the coded discounts are stricken, the filed rate is simply the bureau rate. But the bureau rate is only part of the filed rate. For shippers who pay within 90 days, the filed rate, if one exists, is the bureau rate less the discounts. We cannot strike the discounts and enforce the undiscounted bureau rates in their stead. We would as soon invalidate only the coded restriction on who receives the discount rate, which would leave the Trustee vulnerable to shippers seeking overcharges for discounts denied because their customer numbers were not on the filed tariff. Either way, Transcon's rate filing must be reformed if the coded discounts are invalidated. But it is the Commission that has sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law. *Maislin Industries v. Primary Steel*, 497 U.S. 116, 133, 110 S.Ct. 2759, 2769, 111 L.Ed.2d 94 (*citing ICC v. American Trucking Assns., Inc.*, 467 U.S. 354, 364-65, 104 S.Ct. 2458, 2464, 81 L.Ed.2d 282 (1984)); *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308, *cert. denied*, 456 U.S. 905, 102 S.Ct. 1750, 72 L.Ed.2d 161 (1981) ("where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity").

The Trustee contends that this analysis conflicts with the first holding of our panel's opinion, namely that shippers who neglected to pay within 90 days are

liable for undercharges. But under the rules tariff, shippers who fail to pay within 90 days cannot avail themselves of the coded discounts. The rates for those shipments—undiscounted bureau rates—are filed and enforceable regardless of the status of the coded rates.

The Trustee further contends that this analysis conflicts with existing Ninth Circuit and ICC decisions, but neither case he cites supports his argument. *Friedman Bag Co., Inc. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, Inc.*, Fed.Carr.Rptrs. (CCH) ¶¶ 37,986.01 (May 22, 1992), 1992 WL 110857, 1992 MCC LEXIS 61, *13-*14, recognizes that when no filed rate applies to a shipment at issue, the shipper may collect a just and reasonable rate, but that only the ICC may fashion such a remedy. *Milne Truck Lines Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564, 568 (9th Cir.1992), applied the filed rate, rather than reforming, deconstructing, or in any other way altering the carrier's filing.

In sum, the federal courts are charged with enforcing the filed rate when one exists, but when none exists, only the ICC can fashion a remedy. If coded discounts are illegal, the ICC, not the courts, must determine whether undercharges are available.

OPINION

NOONAN, Circuit Judge:

The Interstate Commerce Commission (the ICC or the Commission brought suit against Transcon Lines (Transcon) and its trustee in bankruptcy, Leonard Gumport (the Trustee), seeking an injunction

against the collection of freight charges in violation of ICC credit regulations or in excess of Transcon's tariffs filed with the Commission. The district court granted summary judgment to the defendants. The ICC appeals.

The case presents several unusual elements: a challenge by the Trustee to the ICC's credit regulations as subversive of the traditional "filed rate doctrine"; the Trustee's repudiation of certain of Transcon's own filed tariffs; the assertion by the Trustee of authority to collect from Transcon's shippers a very large amount of undercharges. We disagree with the reasoning of the district court on these issues and remand to the district court for entry of an injunction against certain of the Trustee's collection activities. At the same time we affirm the district court's denial of an injunction against the Trustee's collection of overdue freight charges.

BACKGROUND

Transcon was once the twelfth largest motor carrier in the United States, with annual revenues of over $200 million. It engaged in its operations as a common and contract carrier in interstate commerce pursuant to authority issued to it by the ICC. On May 1, 1990, an involutary bankruptcy petition was filed against it in the United States Bankruptcy Court, Central District of California. On May 21, 1990, Transcon consented to an order for relief under Chapter 11. Leonard Gumport was appointed its trustee. On July 10, 1991, the bankruptcy court converted the proceeding to one under Chapter 7 and on July 17, 1990, appointed Gumport the Chapter 7 trustee.

On August 23, 1990, the Trustee obtained authority from the bankruptcy court to employ a rate auditor, a collection agency, and collection attorneys for the purpose of collecting freight charges due Transcon prior to its bankruptcy petition. With the aid of these auxiliaries, the Trustee began efforts to collect from shippers an estimated $8 million in unpaid freight charges, consisting of both unbilled charges and charges which, though billed, remained uncollected. The Trustee also began efforts to collect from shippers an estimated $15 million in additional freight charges.

In this suit, filed September 17, 1991, the ICC asserted that the Trustee in his collection efforts was seeking to collect charges in excess of the tariffs filed by Transcon with the ICC and in numerous such instances had asserted a loss-of-discount remedy for non-payment or untimely payment of an original freight bill without complying with the ICC's regulations governing a carrier's extension of credit and a carrier's remedies against a shipper who received credit but did not pay at the agreed-upon time. The ICC provided a sampling of such charges, showing, *e.g.*, against Marson Corporation 28 claims by Transcon for shipments between January and April 1990, for which the total originally billed by Transcon was $9,631.09; of which Marson had originally paid $7,307.91; and for which the Trustee now sought to collect not only the balance remaining but $7,772.85 as the loss-of-discount remedy for failure to pay on time.

The Trustee answered the ICC's complaint on October 8, 1991. The Trustee denied that the ICC had jurisdiction over him in that Transcon was no longer an operating common carrier in interstate commerce.

The Trustee further denied that the ICC's credit regulations were in accordance with the statute authorizing such regulations, 49 U.S.C. § 10743, and went on to offer three "affirmative defenses," viz. (1) that Transcon's "entire discount scheme" was "an unlawful secret rebate scheme" that the Trustee could not enforce or be compelled to enforce; (2) that Transcon's "discount tariffs on file with the Interstate Commerce Commission violated the 'anticredit' statutes set forth at 49 U.S.C. § 10743;" and (3) that the ICC's credit regulations violated "the filed rate doctrine as set forth in the case of *Maislin Industries v. Primary Steel*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990)."

That Transcon filed with the ICC a variety of rates is undisputed. One rate was derived from a combination of "the class rate" and "the bureau tariff." The class rate came from the National Motor Freight Classification, filed with the ICC on behalf of Transcon and other carriers by the National Motor Freight Traffic Association, Inc. In this gigantic compilation of shippable goods, a class was assigned to every shippable object in terms of its weight, shape, and other characteristics affecting transportability. "Bureau tariffs" were also filed by agents for various collectivities of carriers, *e.g.*, the Rocky Mountain Tariff Bureau. The bureau tariff determines the cost of movement by carrier between any two points in the United States for the goods classified under the National Motor Freight Classification. This freight charge, commonly referred to as "the bureau rate," was on file with the ICC on behalf of Transcon as it was on file for other common carriers.

Transcon also filed with the ICC a "rules tariff." This tariff specified, in relevant part, that discounts

"shall apply only when tariff charges are paid within 90 calendar days from the date of shipment." This document added that it "simply establishe[d] a condition precedent," *i.e.*, timely payment, for a discount to be given.

Transcon did, in fact, give discounts to shippers. These discounts, too, were filed with the ICC in a tariff labelled TCON 625. Ninety percent of all discounts given by Transcon were given under TCON 625. In over 98% of the discounts given under TCON 625 the shipper was identified only by a code number. Transcon kept an index to the code for its own use. The index was neither filed with the ICC nor open to the public.

STATUTES, REGULATIONS, AND POLICY

The most relevant statutes, set out in 49 U.S.C. are these:

§ 10743. Payment of rates

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.

(b)(1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service.

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device. . . .

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action— . . . ,

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a foreign motor carrier or foreign motor private carrier providing transportation under a certi-

ficate of registration issued under section 10530 of this title.

The relevant regulations issued by the ICC under 49 U.S.C. § 10743 are set out in 49 C.F.R. § 1320 (as amended through July 24, 1989).[1]

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[1] § 1320.1 Scope.

(a) *General.* These regulations apply to the extension of credit in the transportation of property under Interstate Commerce Commission regulation by rail, motor, and water carriers and household goods freight forwarders, except as otherwise provided. . . .

§ 1320.2 Extension of credit to shippers.

(a) *Authorization to extend credit.* (1) A carrier that meets the requirements in paragraph (a) (2) of this section may—

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified—

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) *When the credit period begins.* The credit period shall begin on the day following presentation of the freight bill.

(c) *Length of credit period.* Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) *Carriers may establish different credit periods in tariff rules.* Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

(e) *Service charges.* (1) Service charges shall not apply when credit is extended and payments are made within the

The relation of many of these regulations to bankruptcy was made evident in a memorandum issued by the ICC on October 9, 1991, on "enforcement

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standard credit period. The term "standard credit period," as used in the preceding sentence, means—

(i) The credit period prescribed in paragraph (c) of this section, or

(ii) A substitute credit period published in a tariff rule pursuant to the authorization in paragraph (d) of this section.

(2) Carriers may, by tariff rule, extend credit for an additional time period, subject if they wish to a service charge for that additional time. The combined length of the carrier's standard credit period (as defined in paragraph (e) (1) of this section) and its additional credit period shall not exceed the 30-day maximum credit period prescribed in paragraph (d) of this section. When such a tariff rule is in effect, shippers may elect to postpone payment until the end of the extended credit period if, in consideration therefor, they include any published service charges when making their payment.

(3) Carriers may, by tariff rule, establish service charges for payments made after the expiration of an authorized credit period. Such a rule shall—

(i) Institute such charges on the day following the last day of an authorized credit period, and

(ii) Notify shippers—

(A) That its only purpose is to prevent a shipper who does not pay on time from having free use of funds due to the carrier.

(B) That it does not sanction payment delays, and

(C) That failure to pay within the authorized credit period will, despite this provision for such charges, continue to require the carrier, before again extending credit, to determine in good faith whether the shipper will comply with the credit regulations in the future.

(4) Tariff rules that establish charges pursuant to paragraph (e) (2) or (3) of this section may establish minimum charges.

policy" to its Office of Compliance and Consumer Assistance—Enforcement Staff (OCCA). The memohandum, after reviewing the beneficial effects of the policy guidelines issued by the ICC in 1988, declared:

(f) *Discounts.* Carrier may, by tariff rule, authorize discounts for early freight bill payments when credit is extended.

(g) (1) *Collection expense charges.* Carrier may, by tariff rule, assess reasonable and certain liquidated damages for all costs incurred in the collection of overdue freight charges. Carriers may use one of two methods in their tariffs:

(i) The first method is to assess liquidated damages as a separate additional charge to the unpaid freight bill. In doing so, the tariff rule shall disclose the exact amount of the charges by stating either a dollar or specified percentage amount (or a combination of both) of the unpaid freight bill. The tariff shall further specify the time period (which shall at least allow for the authorized credit period) within which the shipper must pay to avoid such liquidated damages.

(ii) The second method is to require payment of the full, nondiscounted rate instead of the discounted rate otherwise applicable. The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort. Under this method the tariff shall identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain. The date certain may not be set to occur by the carrier until at least after the expiration of the carrier's authorized credit period.

(2) The damages, the timing of their applicability, and the conditions, if any, as provided by the tariff rule methods allowed under paragraphs (g) (1) (i) and (ii) of this section also:

(i) Shall be clearly described in the tariff rule;

(ii) Shall be applied without unlawful prejudice and/or unjust discrimination between similarly situated shippers and/or consignees;

(iii) Shall be applied only to the non-payment of original, separate and independent freight bills and shall not apply to

Other parts of the guidelines have not worked as well. Departure from the filed tariff has been treated as a rebate or concession which was excluded from the high emphasis enforcement list.

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aggregate "balance-due" claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent;

(iv) Shall not apply to instances of clear clerical or ministerial error such as non-receipt of a carrier's freight bill, or shipper's payment check lost in the mail, or carrier mailing of the freight bill to the wrong address;

(v) Shall not apply in any way to a charge for a transportation service if the carrier's bill of lading independently provides that the shipper is liable for fees incurred by the carrier in the collection of freight charges on that same transportation service;

(vi) Shall be applied only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period.

(3) As an alternative to the tariff-rule methods allowed under paragraphs (g) (1) (i) and (ii) of this section, a carrier may, wholly outside of its tariff, assess collection charges though [sic] contract terms in a bill of lading. By using the carrier and its bill of lading, the shipper accepts the bill of lading terms.

(h) *Discrimination prohibited.* Tariff rules published pursuant to paragraphs (d), (e), and (f) of this section shall not result in unreasonable discrimination among shippers.

§ 1320.3 Presentation of freight bills.

(c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge and/or collection expense charge and discount terms.* When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penal-

However, in the partially deregulated and highly competitive environment of the 1980's, numerous carriers failed to file tariffs reflecting agreed to reduced rates. The subsequent bankruptcy of some of these carriers, and the ensuing efforts of zealous auditors to find any additional monies that might be collected on behalf of those carriers' estates, resulted in a flood of civil actions to collect undercharges from shippers. The Commission's first attempt to deal with this problem (by declaring these carriers' actions an unreasonable practice that would bar collection of the filed rate) was rejected by the Supreme Court.

The widespread bombarding of shippers with undercharge claims has created instability and confusion. In light of this development, it is important that motor carriers and the shipping public continue to be sensitive to the requirement for common carriers to file their rates and adhere to them. Accordingly, tariff filing requirements are worthy of increased attention and cannot be relegated to a low emphasis category. OCCA will consider enforcement action where feasible against carriers who fail to assess and collect filed rates and shippers who knowingly receive such concessions and rebates. Factors to be taken into consideration include whether the number and size of the balance due bills would affect prosecutive merit, whether the nature of the tariff departures make pursuit of the violations appropriate, whether the carrier is in bankruptcy, whether there are pending related Commission proceedings, whether there is a willingness on the part of the carrier to discontinue the unlawful practice and make refunds and whether the enforcement action will be cost effective. The foregoing are merely guidelines which OCCA may follow.

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ties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and any applicable service charge and/or collection expense charge and discount terms.

PROCEEDINGS

Conceding that no material facts were in dispute, each party moved for summary judgment. The district court held a hearing on the morning of November 25, 1991. After argument, the district court denied the ICC's motion for summary judgment and granted the Trustee's and Transcon's cross-motion for summary judgment. In open court in explanation of its judgment the district court gave two reasons: First, the ICC credit regulations conflicted with the filed rate of Transcon. *Maislin*, 497 U.S. 116, 110 S.Ct. 2759, held that an ICC policy could not permit departure from the filed rate; neither, the district court reasoned, could ICC regulations. Second, the failure of the filed discount rate to disclose the name of the customer being given the rate made the filed discount rates illegal; they violated the requirement, read into the statute by *United States v. Chicago and A. Ry. Co.*, 148 F. 646 (1906), *aff'd on other grounds* 156 F. 558 (7th Cir.1907), *aff'd per curiam*, 212 U.S. 563, 29 S.Ct. 689, 53 L.Ed. 653 (1909), that the customer be identified in the filing.

The district court denied the ICC's motion for reconsideration.

The ICC appeals, joined by the United States pursuant to 28 U.S.C. § 517.

ANALYSIS

Jurisdiction. The Trustee has not argued to this court the position he adopted in his answer to the ICC's complaint. Jurisdiction is not now contested. The Trustee stands in the shoes of a motor carrier regulated by the ICC. It would defeat the purpose of the regulatory scheme to hold that bankruptcy ended the ICC's enforcement powers over the carrier. We hold that the ICC is authorized by the statute to bring a civil action of enforcement against the carrier's estate, 49 U.S.C. § 11702, and accordingly we have jurisdiction to hear this suit. 28 U.S.C. § 1291.

The Filed Rate Doctrine. The starting point is the statute governing what regulated carriers must charge, 49 U.S.C. § 10761, a statute that must be read in terms of the several decisions of the Supreme Court insisting on its mandatory character and its central role in the regulation of interstate carriers. The statute, set out in greater fullness above, provides that a regulated carrier shall provide transportation or service "only if the rate for the transportation or service is contained in a tariff that is in effect under the subchapter. That carrier may not receive or charge a different compensation for that transportation or service than the rate specified in the tariff. . . ." As the Supreme Court construed the statute over 75 years ago: "under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext." *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97, 35 S.Ct. 494, 495, 59 L.Ed. 853 (1915). Compliance with the requirement has been found to be "utterly central" to the administration of the Interstate Commerce Act. *Maislin*, 497 U.S. at 132, 110 S.Ct. at 2769.

An exception is written into section 10761 itself for what is "otherwise provided in this subchapter." What is otherwise provided by separate statutory provisions are that the rates may not be unreasonably discriminatory, 49 U.S.C. § 10741; must be reasonable, 49 U.S.C. § 10701; and may be on credit under regulations issued by the ICC, 49 U.S.C. § 10743. The ICC also has the initial responsibility of determining if a rate is unreasonably discriminatory or unreasonable, or if "the practice" of a carrier, as distinct from a rate, is unreasonable, 49 U.S.C. § 10704(b)(1). The interplay of the last statute with the filed rate doctrine was at issue in *Maislin*, which reaffirmed the primacy of the filed rate doctrine. *Id.* at 130, 110 S.Ct. at 2768.

What led to *Maislin* was that the ICC had interpreted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, to justify a substantial departure from the filed rate doctrine. The Motor Carrier Act deregulated interstate trucking in many ways. *Maislin* at 122, 110 S.Ct. at 2764. The ICC concluded that negotiated rates between a carrier and a shipper were now permissible even though the negotiated rate was not filed with the Commission. The negotiated rate was always lower than the filed rate—the negotiated rate was intended to meet competition. As long as the carrier stayed in business, no one objected; a carrier would not offend its customers by reneging on the deal. But when a carrier went out of business and a trustee in bankruptcy replaced it, the situation changed radically. The trustee was interested only in collecting the maximum amount legally possible; the trustee was not constrained by the desire to preserve the confidence of the carrier's customers. The trustee was in the position to denounce the nego-

tiated, unfiled rate as illegal and to insist on the payment of the higher filed tariff.

Such was the case in *Maislin*. From 1981 to 1983 a carrier had negotiated rates with shippers that were below its filed rates; the negotiated rates were never filed; the carrier entered bankruptcy; the trustee sought to recover from over one thousand shippers the undercharges, i.e., the difference between the filed rates and the negotiated rates. One shipper, who was sued for $187,923.26 of undercharges, defended by claiming that the carrier's practice of seeking the full amount was unreasonable and that the filed tariff was unreasonable. The district court referred these issues to the Commission, which held that the trustee's attempted collection was an unreasonable practice inasmuch as the shipper had in good faith relied on the negotiated rate. Back in the district court, the ICC's ruling was given effect, and the Eighth Circuit affirmed, holding that there was no provision in the Interstate Commerce Act "elevating" the filed rate requirement over the requirement of reasonableness. 879 F.2d 400, 405 (8th Cir.1989). The Supreme Court reversed, adhering to the primacy of the filed rate doctrine. *Maislin*, 497 U.S. at 130, 110 S.Ct. at 2768.

In the course of reaching this conclusion, the Court rejected arguments that would have led to the opposite result and were vigorously pressed by the dissent. First, it was argued that the ICC was the agency charged with the administration of the Interstate Commerce Act and with its harmonious interpretation as a whole; deference was due its interpretation. *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). Second, it was

argued that the filed rate requirement was a vestige of an earlier era where policing of the vast power of the railroads was the thrust of the regulatory scheme; the Motor Carrier Act of 1980 had changed all that as far as trucking was concerned; vigorous competition among the carriers was now to be encouraged. Third, it was contended that the only beneficiaries of the Court's rigid insistence on the old requirement would be the bankruptcy bar and the unsecured creditors of bankrupt carriers, to say the least a strange policy result and contrary to the usual consideration given to equity in the administration of a bankruptcy.

The Court was adamant. The statute as construed by the Court put the filed rate requirement first. The agency's ruling could not stand if it derogated from the filed tariff. If deregulation and competition were to have complete sway it was for Congress not the ICC or the courts to repeal the old law, so often construed and enforced by the Court. If a windfall was given to unexpected recipients—so at least the Court implied—it was not the Court's business. Long ago it had determined that shippers were not entitled to equitable defenses against the filed rate. *Texas & Pacific R. Co. v. Mugg*, 202 U.S. 242, 26 S.Ct. 628, 50 L.Ed. 1011 (1906). "Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it." *Maislin*, 497 U.S. at 128, 110 S.Ct. at 2767. The special equitable considerations governing bankruptcy (e.g., He who seeks equity must do equity) were not mentioned but inferentially, as *Maislin* was a bankruptcy case, these equities, too, were subordinated to the filing requirement. In a triumph of doctrinal consistency, the filed rate doctrine ruled the roost.

Transcon's Filed Rate. As already described, Transcon had on file with the ICC the bureau rate setting out its full charges; its discount rate; and the rules tariff providing that the discounts applied to charges that were paid within 90 days of the date of shipment. Together these filings constituted Transcon's filed rate. None of the filed rates incorporated all the conditions set by the ICC for the extension of credit.

The application of Transcon's filed rate leads (1) to the grant of discounts subject to a condition; (2) to the loss of the discounts when the condition is not met, i.e., payment is not made in 90 days; with the result (3) that the bureau rate governs.

The Impact of the ICC's Credit Regulations. The regulations, the ICC responds, are being ignored. Under the statute, § 10743, credit can be extended by a carrier only if it complies with the regulations. Transcon and the Trustee have not complied with a number of regulations, to wit (1) that the original bill to the shipper carry a notice of the penalty for late payment, 49 C.F.R. 1320.3(c); (2) that such penalty be applied "only to the non-payment of original, separate, and independent freight bills and shall not apply to aggregate 'balance-due' claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent." *Id.* 1320.2(g)(2)(iii); and (3) new bills asserting the penalty must be issued "within 90 days of the expiration of the authorized credit period." *Id.* 1320.2(g)(2)(vi).

Transcon did not comply with the regulation requiring the notice in the original bill, and it is too late for the Trustee to remedy this omission. The Trustee has not complied with the regulations requiring new, individual, non-aggregated bills, and he would find it difficult or impossible to do so. As the regulations have not been complied with, so the Commission contends, the Trustee cannot collect the bureau rate.

The ICC's position depends on one further proposition: that the difference between the discount rate and the bureau rate constitutes the "liquidated damages" that the carrier may collect when the shipper-on-credit does not pay on time. 49 C.F.R. § 1320.2(g)(1)(ii). In the terms used by this regulation, "collection expense charges" are what a carrier collects when the shipper is assessed for overdue freight charges and the difference between the discount and nondiscount rate constitutes the carrier's liquidated damages for [illegible]s expense. It is the ICC's position that the only authority the carrier has for collecting these liquidated damages is obtained by complying exactly with the preceding ICC regulations on credit.

We need not in this case determine the validity of the ICC credit regulations. We need not, for example, determine whether the difference between discounted and bureau rates can so neatly be turned into liquidated damages; nor need we explore the absence of any reference in the regulations to interest or the meaning of "service charges" which the same set of regulations apparently uses in distinction to "collection charges," *see id.* § 1320.2(e). On such questions, it may well be that deference should be given, as *Chevron* requires, to the agency's expertise. We also do not question that, in general, the ICC has power to enforce its credit regulations by seeking an injunction. 49 U.S.C. § 11702(a)(4) and (a)(6). The ICC has broad powers to shape remedies for the violation of its rules. *I.C.C. v. American Trucking Assns. Inc.*,

467 U.S. 354, 355, 104 S.Ct. 2458, 2459, 81 L.Ed.2d 282 (1984).

The case, however, is different when the ICC seeks an injunction applying its regulations in such a way as to undercut the filed requirement. Then *Maislin* governs. Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then has no greater force than the policy rejected in *Maislin*. Although the Act authorizes the ICC to regulate carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

As *Maislin* points out, "past experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes," so as to give lower rates to favored shippers, "while other shippers, less fortunate in their relations with carriers . . . would be compelled to pay the higher published rates." *Maislin*, 497 U.S. at 126-47, 110 S.Ct. at 2766-77 (quoting *Poor v. Chicago, B & Q.R. Co.*, 12 I.C.C. 418, 421 *Grain Co.* (1907)). Here, the ICC seeks to enforce its regulations in a way that essentially encourages and endorses such methods of circumventing the filed rate requirement, for it would prevent the Trustee from collecting the bureau rate in accordance with all of its filed tariffs. If allowed to enforce its regulations in this way, "the ICC [would permit] the very price discrimination the Act by its terms seeks to prevent." *Maislin*, 497 U.S. at 130, 110 S.Ct. at 2768.

The Commission's reliance on *Delta Traffic Service, Inc. v. ADM*, 954 F.2d 721 (5th Cir. 1992), and *Delta Traffic Service, Inc. v. Mennen Co.*, 919 F.2d 134 (3d Cir. 1990), is misplaced. First, both opinions are unpublished, although the district court opinion in the Third Circuit case is published. *See Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.1990). Second, both involved loss-of-discount provisions adopted by carriers at a time when ICC regulations did not permit such provisions. Transcon's loss-of-discount provision, in contrast, was adopted after the 1988 amendment to the ICC regulations that specifically authorized such provisions.

Going by the filed rate as we must, there is a single filed tariff governing here: the rules tariff providing that the discount lasts only for 90 days after the date of shipment and that timely payment is a precondition of the discount.

There is no need to go beyond this determination of what the operative tariff is. One or two other points, however, are worth mentioning. In oral argument the ICC maintained that "no one reads the tariffs," that is why the ICC's credit regulations required notice by bill. We do not know the accuracy of the ICC's observation although we are instructed by the Supreme Court that "there are commercial services providing up-to-the-minute details of the carrier's rate schedule." *Maislin*, 497 U.S. at 132, 110 S.Ct. at 2769, n. 12. If a shipper doesn't read the tariff, would the shipper read the regulations? It is fair to suppose that any buyer getting a discount subject to a precondition is aware that there is a full rate to be paid if the precondition is not met and it is fair to put upon the buyer the burden of knowing what the precondition is. The equities here are not necessarily

with the late-paying shippers. They enjoyed the extension of credit by the carrier while the carrier became insolvent. It is not fair to make them now contribute to the payment of the carrier's unsecured creditors. But, under *Maislin*, we need not balance equities. The filed rate is decisive.

Not exactly for the first reason given by the district court, that the credit regulations are "invalid," do we affirm its judgment, but because the Commission's regulations cannot be enforced in this way to undercut the filed rate.

The Coded Rates. We also do not adopt the second reason given by the district court that the coded discount rates were invalid because publication of the customers names was required. If that reason held, the vast majority of Transcon's discount rates, being coded, would be unlawful, and the Trustee could believe he could collect the bureau rate as the only filed rate that was lawful. In invalidating the coded discount rates, the district court drew no conclusions as to what the Trustee was free to do beyond denying the ICC the injunction it sought. The Trustee, however, has interpreted the invalidation of the coded rates as the equivalent of a declaration that the only rate in effect was the bureau rate. Following the district court's decision, the Trustee informed shippers who had already paid in timely fashion the original amount billed that "the discount you were granted was and is invalid," adding that the full amount must now be paid.

We must admit to being troubled by the ICC's policy of allowing codes alone to identify shippers. Such a practice leads to secrecy, and secrecy makes possible discrimination in rate-setting. Yet we cannot agree with the district court's decision to address

the validity of the scheme because Transcon, as a carrier, lacks standing to challenge the lawfulness of its own rates, for two reasons: (1) a carrier cannot obtain reparations from a shipper for undercharges; (2) a carrier's interests are not within the zone of interests protected by the Act. These reasons are more fully elaborated below.

(1) In the jargon surrounding the Act, a "legal" rate is the *filed* rate. *See Maislin*, 497 U.S. at 128, 110 S.Ct. at 2767 ("the filed rate is the *legal* rate"). But a rate is not immune from challenge simply because it is filed; that rate must also comport with the other provisions of the Act. Any challenge to a filed rate is a challenge to its "lawfulness." *See Maislin, id.; Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 384, 52 S.Ct. 183, 184, 76 L.Ed. 348 (1932); *Chicago, M., St. P. & P.R. Co. v. Alouette Peat Products*, 253 F.2d 449, 455 n.5 (9th Cir. 1957); *Southern Pacific Transp. Co. v. San Antonio, Tex.*, 748 F.2d 266, 273-74 (5th Cir. 1984). In the technical language of the Act, an attack on the "legality" of a rate means an allegation that the rate is not a *filed* rate. As *Maislin* proves, a carrier has standing to challenge the legality of its own rates.

But it is another matter for a carrier to challenge the lawfulness of its own filed rates. A court has no power to declare a filed rate unlawful and award damages to a carrier for the past application of the rate by the carrier. A shipper may pay the filed rate, sue because the rate was unlawful, and recover reparations. *Maislin*, 497 U.S. at 128, 110 S.Ct. at 2767. No similar right exists for a carrier to recover damages because of its own illegality.

It is established law that "the shipper may receive reparation for overpayment while the carrier can

never be made whole after underpayment." *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 141-42, 103 S.Ct. 514, 521-522, 74 L.Ed.2d 311 (1982). The only exception noted by the Court is a provision for a carrier to recover a portion of a rate that was suspended by the Commission but later found to be reasonable. 49 U.S.C. § 10707(d)(2). "[A] carrier may receive reparations *only* when underpayment was the result of the Commission's suspension of a tariff." *Union Pacific R. Co. v. Nevada Power Co.*, 950 F.2d 1429, 1434 n. 6 (9th Cir. 1991) (emphasis added). This court has no power to grant Transon reparations for its own unlawfulness.

Under Article III of the Constitution, federal courts may only adjudicate actual "cases" or "controversies." A "core component" of the federal doctrine of standing is "derived directly" from this constitutional limitation. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). One aspect of the "constitutional component of standing doctrine" is that the unlawful conduct complained of by a litigant must appear "likely to be redressed by the requested relief." *Id.* But no federal court can grant Transcon or the Trustee any effective relief for the unlawfulness they allege. Transcon and the Trustee therefore lack standing to bring a claim alleging the unlawfulness of their own filed rates. Federal courts are "without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971).

The Bankruptcy Act authorizes the trustee to act on behalf of creditors for the purpose of recovering

preferential or fraudulent transfers made by the bankrupt, *see, e.g., In re Leasing Consultants, Inc.*, 592 F.2d 103, 110 (2d Cir. 1979). No such authorization exists for the trustee to fit "into the overshoes of the bankrupt's creditors," 592 F.2d at 110, to challenge rates Transcon has filed in an effort to collect higher rates. *See In re Ozark Restaurant Equip. Co., Inc.*, 816 F.2d 1222, 1224-1226 (8th Cir. 1987), *cert. denied*, 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 102 (1987).

(2) The doctrine of standing also includes "several judicially self-imposed limits on the exercise of federal jurisdiction." *Allen*, 468 U.S. at 751, 104 S.Ct. at 3324. One of these "prudential" standing limits requires that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee." *Data Processing Service v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). The publication requirement of the statute is designed to protect shippers against discrimination and to protect carriers against the competitive disadvantage they may suffer if other carriers discriminate. It is not designed to allow carriers, or their successors in bankruptcy, to repudiate their own filed rates in hopes of collecting a higher rate. Thus, the interest that the Trustee asserts does not fall within the zone of interests that the Act protects. *See, e.g., Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976) (carrier lacked standing to challenge ICC order on environment grounds).

The Trustee may say, if I can collect the bureau rate on overdue charges, why cannot I collect the

bureau rate if the alternative tariff is held illegal? The answer is the filed rate doctrine. When the Trustee collects on the overdue charges, he follows the filed rate, *i.e.*, the rules tariff. When the Trustee seeks to collect the bureau rate in lieu of the allegedly unlawful discount rate, he leaps over the filed rate. He may not do so.

The Trustee cannot make an end run around the limitations on the carrier's remedies and the Act's zone of interests by having a court find one filed rate unlawful and then moving to collect the other filed rate that still stands. To permit such a process would be to stand the Interstate Commerce on its head and give federal courts an authority over rates that has never been conceded by a statutory scheme where "court-ordered relief interferes with the delicate balance the Act strikes between the competing interests of shipper and carrier." *Burlington Northern*, 459 U.S. at 140, 103 S.Ct. at 521.

The Trustee's Attack On Transcon's Entire Discount Scheme. It will be recalled that the Trustee's first affirmative defense was that Transcon's "entire discount scheme" was "an unlawful secret rebate scheme." That contention was not adopted by the district court. The Trustee returns to it in his brief and oral argument on appeal, in effect tying it to his attack on the coded discount tariffs.

The Commission in 1984 ruled that rates could be filed by carriers in terms of individual named shippers and that such rates were not per se unlawfully discriminatory. *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984) ("Named Shipper"). In defense of this ruling the Commission observes

that the Interstate Commerce Act does not require that all shippers be treated identically but simply prohibits "unreasonable discrimination." 49 U.S.C. § 10741(b). The Commission goes on to argue that individual case-by-case examination of alleged discrimination is necessary because "carriers and shippers have unique requirements and opportunities" and there must be competitive injury to a shipper before discrimination is demonstrated.

The Trustee attacks this policy, citing earlier rulings of the Commission, *e.g.*, *California Commercial Ass'n v. Wells Fargo, & Co.*, 14 I.C.C. 422 (1908) and judicial precedent, *e.g.*, *Arizona Grocery Co. v. Atkinson Ry.*, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 (1932). The Trustee's basic argument is that a common carrier cannot operate by means of individually negotiated rates. The Trustee's argument is tied to the issue of the coded rates, because the codes came into use only as the ICC permitted rates with named shippers to be filed in 1984. Prior to this time, there was no point in identifying the shippers as the tariff was general. The secret code, the Trustee contends, is a badge of the secret rebate constituted by the named shipper rate.

The amount at stake if the Trustee's position should prevail is very large. The ICC estimates it at $1 billion. The Trustee informs us that he intends to sue "several hundred thousand shippers" by May 1992. The deadline is presumably set by the three-year statute of limitations on claims for transportation charges. 49 U.S.C. § 11706(b).

We decline to decide the lawfulness of the individual discount rates for the same reasons that the Trustee's complaint about the secret code is not rele-

vant to this case. Transcon and the Trustee lack standing to raise this claim. They do not possess the sort of interests the Act was meant to protect and the court, by invalidating the discount rates because they were coded or because they were individual, could afford no remedy to the Trustee. The court lacks power to award the carrier damages retroactively or to circumvent the restriction on its power by striking one filed rate and authorizing the Trustee to collect the rate left standing. No retroactive remedy exists for a carrier that has filed an unlawful rate.

Conclusion. The district court erred in holding the credit regulations of the ICC invalid and the coded discount rates illegal. The case is REMANDED to the district court for entry of an injunction against the Trustee collecting any amounts on the grounds of the unlawfulness of coded rates or the unlawfulness of individual discount rates. The judgment in favor of the Trustee as to collection of the bureau rate on overdue accounts is AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ICC

v.

TRANSCON LINES

October 23, 1992

ORDER

The following amendment is added to the opinion filed on June 17, 1992.

At slip opinion page 7092, after fifth line, insert the following as a new paragraph:

> The Bankruptcy Act authorizes the trustee to act on behalf of creditors for the purpose of recovering preferential or fraudulent transfers made by the bankrupt, *see, e.g., In re Leasing Consultants, Inc.*, 592 F.2d 103, 110 (2d Cir. 1979). No such authorization exists for the trustee to fit "into the overshoes of the bankrupt's creditors." 592 F.2d at 110, to challenge rates Transcon has filed in an effort to collect higher rates. *See In re Ozark Restaurant Equip. Co., Inc.*, 816 F.2d 1222, 1224-1226 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ICC

v.

TRANSCON LINES

December 10, 1992

ORDER

The opinion filed June 17, 1992 and amended October 23, 1992, is further amended as follows:

Replace the sentence on pages 12779-80 ("The Trustee cannot make an end run . . .") with the following:

> The Trustee seeks to characterize his challenge to Transcon's rates as one of legality rather than lawfulness—that is, he argues that Transcon's coded tariffs were not duly filed because neither the Commission nor the public could determine from within the four corners of the tariff the identity of the shipper receiving each coded discount. Without deciding whether the Act requires publication of customers' names, rather than merely of the rates they receive, we reject this argument. If coded rates are not duly filed

> and published rates, then Transcon's rates had not been filed. Without rates on file, the Trustee has no basis for collecting undercharges. *Wonderoast, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272, 278 (1992). We reject the invitation to disaggregate Transcon's rates, invalidating the discounts and leaving the Trustee to collect undercharges on the basis of a truncated filing never meant to stand alone.

Then, following the rest of the paragraph at the top of page 12780, add, after the citation to *Burlington Northern*, one sentence:

> It is the Commission which has discretion to craft appropriate remedies when the rates on file with it do not themselves comport with the law. *Maislin*, 497 U.S. at 133 (*citing ICC v. American Trucking Assns., Inc.*, 467 U.S. 354, 364-65 (1984)).

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

CV 91-5036-IH

INTERSTATE COMMERCE COMMISSION, PLAINTIFF

vs.

TRANSCON LINES, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

NOVEMBER 25, 1991

Appearances:

For the Plaintiff:

INTERSTATE COMMERCE COMMISSION
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and

INTERSTATE COMMERCE COMMISSION
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[4]

Los Angeles, California; Monday,
November 25, 1991

(10:30 A.M.)

THE COURT: Okay, Mr. Clerk. We will get to Transcon at this point.

THE CLERK: Item Number Five, CV 91-5036-IH, Interstate Commerce Commission versus Transcon Lines.

Counsel, would you announce your appearances, please.

THE COURT: Let's see. We will take the appearance for the plaintiff first.

MR. DAY: Your Honor, I'm Stephen Day with the Interstate Commerce Commission. I understand my application for pro hac vice was approved by the court.

THE COURT: I don't remember. I think I signed some in this case. Will you be handling it, Mr. Day?

MR. DAY: Yes, Your Honor, I will. And with me is Patricia Burke Kuhlmann, who is an Attorney with the Interstate Commerce Commission.

THE COURT: Wait. Let me get all these appearances. Patricia Burke Kuhlmann. That's this lady?

MR. DAY: Yes.

THE COURT: And both of you are from I.C.C.'s legal staff in Washington?

MR. DAY: We are with the Office of Compliance and Consumer Assistance, Your Honor.

[5] THE COURT: Of I.C.C.?

MR. DAY: Yes, Your Honor.

THE COURT: Okay. Out of Washington?

MR. DAY: I'm in Seattle, Washington and Patricia Kulhmann is in Washington, D.C.

THE COURT: All right. And you'll be handling it, Mr. Day?

MR. DAY: Yes, Your Honor.

THE COURT: Very well.

MR. DAY: Also present with us today is Henri Rush, who is Deputy General Counsel for the Interstate Commerce Commission.

THE COURT: That's this gentleman over here?

MR. DAY: Yes, Your Honor.

THE COURT: All right, Mr. Rush. You are welcome as is Ms. Kuhlmann. And you may sit at counsel table.

And is there someone here from the U.S. Attorney's Office as well?

MS. LUYMES: Yes, Your Honor. Jan Luymes from the U.S. Atorney's Office here. I will be acting as local counsel as a contact point for the court.

THE COURT: Very well. All right. For the defendant now.

MR. ASHWORTH: Yes. Good morning, Your Honor. Christopher Ashworth of Garfield, Tepper, Ashworth & Epstein [6] for the defendant trustee Leonard L. Gumport.

THE COURT: Okay. This action was just recently filed. The filing date was September 18th. The answer was filed October 8th.

Now the court is confronted with reciprocal motions by the two parties for summary judgment. Each of those motions seeks total judgment as against the other. Am I right in that?

MR. DAY: Yes, Your Honor, that is correct.

MR. ASHWORTH: Yes, Your Honor.

THE COURT: All right. Since plaintiff is seeking an injunction, the judgment if granted to plaintiff will be an injunction, and plaintiff has lodged

under date of November 8th their proposed judgment, although it isn't called a judgment. It's called a proposed order.

Now, I must ask you right at the threshold, may I assume by virtue of the existence of these reciprocal motions that both sides agree that this matter is ripe for adjudication one way or the other for the granting of a judgment one way or the other at the end of today's hearing?

MR. DAY: We both agree to that.

MR. ASHWORTH: Yes.

MR. DAY: We have discussed that, Your Honor.

THE COURT: All right. This means, of course, that you're both agreeing that there are no bona fide disputes of [7] material fact that would preclude the court from granting a judgment to one side or the other; right?

MR. DAY: That's correct, Your Honor.

MR. ASHWORTH: Yes.

MR. DAY: We both agreed to that.

THE COURT: All right. The issue presented then is one of law alone.

MR. DAY: Yes, Your Honor.

THE COURT: Correct, Mr. Ashworth?

MR. ASHWORTH: Yes, sir.

THE COURT: All right. As I understand it, and I will ask you shortly to respond, the undisputed facts are as follows. The defendant Gumport is the trustee in bankruptcy in a Chapter 7 bankruptcy proceeding of a corporation called Transcon Lines. When it was active it was a large I.C.C. carrier.

Pursuant to the requirements of the I.C.C. statute, Transcon filed rates for its services. The original filings were for every class of goods and provided a single rate for a single destination or service.

Thereafter, Transcon filed pursuant to the statute certain discount rates which had the effect of changing the rates previously filed for certain customers and which provided substantial discounts from the previously-filed general rate for the benefit of those certain customers.

[8] I.C.C. accepted the original general filings and also accepted these later discount filings.

The discount filings contain a provision for loss of the discount in the event payment was more than 90 days late. Put another way, that provision said that if payment was more than 90 days late, the shipper would have to pay the original and higher general filed rate.

Since the bankruptcy, the trustee is attempting to collect from shippers the general filed rate on many shipments. A total of at least 15 million dollars allegedly due is sought on the theory that the discounted rate was lost by failure to pay within the 90-day period.

The trustee, defendant in our case, is attempting to collect these sums in a number of lawsuits that are pending in this district. One of them, a case called Transcon versus Winfield, is pending in my court, case CV 91-1418-IH.

Collection efforts without litigation or preparatory to litigation are also going on in addition to the lawsuits already filed.

The judgment sought by—let me stop here. If I have misstated any of those facts, I would be happy to hear your view about that now. From Plaintiff?

MR. DAY: No, Your Honor. I don't think that's a mistake.

THE COURT: All right.

[9] MR. ASHWORTH: You're doing fine so far, Your Honor.

THE COURT: I didn't ask you that. I only asked you whether I had misstated the facts.

MR. ASHWORTH: I agree with your characterization.

THE COURT: A cheering section is not often available to a judge and I sure don't want any. Okay. You can do that down at the Coliseum at the next UCLA/SC football game.

The judgment sought by the plaintiff I.C.C. in this case—the judgment that will be granted if they win today—is a judgment to prevent the trustee from attempting to collect such additional sums by enforcement of the loss of discount provision of the filed rates.

Plaintiff's case is limited to that attempt and the relief sought, the injunction, would be limited to that practice and that collection effort; right?

MR. DAY: Yes, Your Honor, that is correct.

THE COURT: All right. The reason this is important, Mr. Day, is the language in the complaint seems in some places broader than this problem of enforcing the loss of discount provision.

And if you look at the proposed order—would you? —page 2, lines 13 through 20.

MR. DAY: Page 2, Your Honor?

THE COURT: Yes. Lines 13 to 20. You see there a paragraph that could be read as being broader than stopping [10] the loss of discount collection efforts. That's why the matter was raised specifically with you. And you have told me that your intent is to attack the attempt to collect on the loss of discount; right?

MR. DAY: Yes. The language is broader, Your Honor, but as the papers have proceeded here, I think that we have refined the issue down to just the loss of discount provision and whether or not that can be done.

THE COURT: Okay. Thank you. Let's go ahead. I want to pose the problem that these reciprocal motions raise and discuss the contentions of the two sides. In analyzing this problem, we start with my view with the filed rate doctrine as enunciated in the Interstate Commerce Act at 49 U.S. Code, Section 10761(a).

That section of the statute provides in essence that a carrier subject to the I.C.C. statute and regulations and subject to regulation by the I.C.C. shall provide transportation or service only for the rate that is contained in a tariff which is in effect under the statute.

It goes on to provide in the second sentence of the statutory section that the carrier may not charge or receive any different compensation for that transportation or service than that specified in the filed rate.

The position of the trustee is in my view fairly simply stated. The trustee points to the loss of discount [11] provision that is incorporated as a part of the filed tariff for every bill that is the subject of his collection effort.

We find this in Exhibit 1 of the Trustee's appendix of exhibits that was filed October 29, 1991. Perhaps you would be good enough to take a look at Exhibit 1, page 1-03. Do you find that? Take your time.

MR. ASHWORTH: Defense counsel has it before him, Your Honor.

THE COURT: Okay. We'll see—

MR. DAY: Your Honor, it's Exhibit 1. What page?

THE COURT: Exhibit 1, page 1-03.

MR. DAY: Yes, Your Honor, I have it.

THE COURT: You have it. All right. At the top of that page, gentlemen, is the loss of discount provision that is at issue. The loss of discount provision seems to be a part of the filed tariff in every situation where the trustee is attempting to collect further monies.

That loss of discount provision says in relevant part as follows, and I am quoting:

> "Discounts . . . and then three dots—shall apply only when tariff charges are paid within 90-calendar days from date of shipment," close quote.

Incidentally, the I.C.C.'s factual presentation to me also contains the same loss of discount provision of filed [12] tariffs. I.C.C. has it as Exhibit 12 to their appendix of exhibits filed November 8, 1991.

And in the I.C.C. version of this at pages 43 through 46, there is a file stamp showing I.C.C.'s receipt of these filed tariffs as of April 25, '88 and another one showing receipt as of June 6, '88.

Continuing with the analysis of the trustee's position. The trustee is saying, therefore, all I want to do is collect what is due, because by paying the discounted charges too late, after the 90-day period, the shipper in question lost the benefit of the discount provision. The benefit was lost pursuant to the language of the filed tariffs, which the court has just read.

Now for I.C.C.'s position. I.C.C. seems to say that's all true. And if you read the loss of discount provision alone, the discount might well be considered lost. But says the I.C.C., you cannot read it alone.

I.C.C. says that the discounts cannot be taken away from the shipper except in connection with and in conformity with regulations, which we the I.C.C. have published with respect to credit granted to shippers. Those regulations, the I.C.C. says, are found at 49 C.F.R. 1320.

Continuing with the I.C.C. position. These credit regulations bar enforcement by the trustee of the loss of discount provisions of the tariff. Enforcement is barred [13] because under those regulations if the carrier doesn't send revised bills or notification to the delinquent shipper within 90 days after the expiration of, quote, "the authorized credit period," close quote, the discount provisions cannot be enforced.

The term "the authorized credit period," by the way, is defined elsewhere to mean 15 days from the date of shipment. The definition of that term is found at 49 C.F.R. 1320.2G2VI—six being roman.

The I.C.C. also says that enforcement of the loss of discount provision is barred to the trustee by two other provisions of its regulations. The next one they rely on is 49 C.F.R. section 1320.3C. That one in essence says that carriers must include certain information on their freight bills. The regulation contains examples of what must be said on the freight bills.

In lieu of reading the whole regulation, I would describe those requirements generally as requiring the bills to say, quote, "failure to pay these charges timely may subject you to penalties," close quote. And I.C.C. says that information was not on the freight bills in issue.

The third and last of the regulation provisions that I.C.C. relies on is 49 C.F.R. 1320.2G2III—the last three being roman or three "I's." I guess that's not roman. Three "I's. And the other one I just discussed being two "I's."

[14] In any event, the last one here, 2G2III, says in essence that the trustee in bankruptcy—mentioned in haec verba—the trustee in bankruptcy may not collect aggregate balance due claims unless there have been independent and separate bills.

I must ask the I.C.C. one question now please, Mr. Day. Come to the podium. Assuming that the original freight charges were embodied in independent and separate bills, what meaning does the commission attach to the, quote, "independent and separate bill" provision of this regulation?

Are you saying that a lawsuit cannot be instituted to collect the loss of discount amounts arising out of any shipments? That a separate lawsuit has to be filed for each one? Are you saying that a separate billing for the loss of discount has to be filed for each shipment? What is your position?

MR. DAY: No, Your Honor. Not a separate lawsuit. The rule was adopted to make sure that carriers would not wait a long period of time and then batch up a number of these undercharges and present them to the shipper two to three years later.

THE COURT: I don't follow that. Let's assume, and I think it's a valid assumption, that the original shipment and the invoice for it was a separate bill.

MR. DAY: Yes.

[15] THE COURT: Okay. Now are you saying some other and different bill has to be sent under this provision?

MR. DAY: Yes, Your Honor.

THE COURT: What other and different, separate bill?

MR. DAY: It would be a bill that would indicate that the additional amount is now due for failure to pay within the first 90-day period. In other words, the first bill, for instance, would be $100 on the discounted amount, and then after the expiration of 90 days and failure to pay, the carrier must rebill.

THE COURT: Let's assume arbitrarily that the discount given and now lost was $20. You have to send a new and separate bill? When?

MR. DAY: Yes, Your Honor. Within that 90-day period to indicate that there is a loss—

THE COURT: Within the 90 days? You don't lose it until 90 days have expired. So what's this about sending a separate bill within the 90-day period?

MR. DAY: It is my understanding, Your Honor, that the bill must state that you have lost the discount and this is the total amount you now owe. That was the purpose of the rule.

THE COURT: Well, when must that separate bill be sent?

MR. DAY: Your Honor, the rules does say within 90 [16] days after expiration of the authorized credit period.

THE COURT: Well, it's 90 days after the 90 days which caused the loss of discount; it that right?

MR. DAY: No, Your Honor. It's after the authorized credit period which Your Honor has defined.

THE COURT: That's 15.

MR. DAY: Within the 15.

THE COURT: Within 90 after 15; is that what you're saying?

MR. DAY: That's correct.

THE COURT: And most of that 90 is still within the 90 days when they can get the discount; right?

MR. DAY: I don't know if that's correct.

THE COURT: I don't follow this very well. I don't think it's going to be critical to the decision. But I ask you only because the papers did not make this clear. Have a seat.

As I understand the trustee, the defendant's response to this position by I.C.C., he says it is quite true that the requirements of these regulations have not been met. But, says the trustee, the regulations do not apply and cannot apply because they are not valid. They are not valid, he says, because they purport to change or derogate from statutory provisions which bind the bankrupt and govern the matters at issue.

[17] For this position the trustee relies primarily on the recent Maislin, M-a-i-s-l-i-n, decision in the Supreme Court. Maislin Industries versus Primary Steel Incorporated, 110 Supreme Court 2759, decided in 1990.

Maislin must be carefully examined. There the conflict was much the same as it is here. We had a bankrupt carrier there suing the shipper for the full published tariff rate. The services had been performed some time back, and the carrier had billed that customer at a discounted rate under a previously-struck agreement.

The customer had paid the charges billed in full. The District Court in Maislin stayed the proceedings in the District Court and referred the matter to the I.C.C. The I.C.C. rendered its judgment in favor of the shipper under an I.C.C. policy that was published in a formal manner, which policy prevented the collection of new charges. New charges being those above what was billed but within the original filed rate. It prevented the collection of those so-called new charges on the ground that collecting them constituted a, quote, "unreasonable practice," close quote.

I.C.C. had some statutory authority to prevent unreasonable practices. The Supreme Court held that the enforcement of the I.C.C. policy undermined the statutory filed rate doctrine and could not affect the obligation of the shipper to pay the full rate under the filed rate doctrine.

[18] Now, I want to tell you my tentative view of this case. In my tenative view Maislin should govern this case as well and its rationale should govern. I see no basis for arguing that there is any legal difference in terms of affecting the validity of the filed rate doctrine between a formal and formally published I.C.C. policy which he had in Maislin and a formal and published I.C.C. regulation or regulations which we have here.

If either violates the statutory command of the filed rate doctrine, Maislin teaches that it must yield and it is invalid.

For the purpose of interpreting Maislin and determining what the "filed rate" is, as the term is used in the filed rate doctrine, I believe that the defendant trustee here is correct as it defines that term. Defendant defines the term "filed rate" to include all of Transcon's tariffs including class rates, bureau rates, rules tariffs, and discount rates.

Now, I would like to hear from you, Mr. Day, whether you take issue with that definition of the term "filed rate."

MR. DAY: Your Honor—

THE COURT: Just that question.

MR. DAY: Just that question. No, I don't take issue with that at all.

THE COURT: Okay. Although my tentative decision [19] enunciates what I believe is a clear and strong basis for granting defendant's motion and denying plaintiffs', I want to note for the record that the defendant trustee has enunciated in his motion a second, an alternative ground for it. The defendant argues as follows as to this alternative ground.

If the trustee says for any reason the filed rate doctrine and the Maislin rationale is held not applicable to the loss of discount provision and is held to be not a proper basis for dismissing the action, there is a separate second basis.

The argument for the second basis goes this way. Transcon's discount rates were never filed with the name of the customer to whom they applied clearly revealed in the rate itself. For example, if you will look at page 24 of defendant's points and authorities—and tell me when you have it.

You really don't have to wait for it because you know these papers. Let me tell you what it says. One of the customers is coded as being 139779, Number 139779, and others are like that. Defendant takes the position that the customer being referred to by that number was never disclosed even to the commission.

The trustee says that he has in his office at this point a list of which customers have what code numbers in these rate filings and he tells me, the trustee does, that [20] this particular code number 139779 applied to Premier Pump and Pool Products.

Defendant argues that that kind of a rate which keeps the customer's name hidden from competitors and from the commission is illegal. It is illegal, says

defendant, because there is a publication requirement in 49 U.S.C. Section 107762A1.

The language of the statute does not explicitly require a customer's name to be shown when a rate is applicable to only one customer, but we do have case law that does impose that requirement.

The case is one from a district court that was affirmed in the Seventh Circuit and in the U.S. Supreme Court. I believe the trustee has cited it. The case is U.S. versus Chicago and AR Company, 148 Fed 646, going back to 1906, affirmed by the Seventh Circuit in the next year, 156 Fed. 558 and by the Supreme Court in 1908 212 U.S. 563.

The District Court opinion which was affirmed does utilize a holding that it violates the publication section of the statute not to name the customer in such a situation.

Now, I am aware that the authority cited is old. But in my view the authority nevertheless has the ring of persuasion about it. And I therefore would tentatively adopt this as a second separate, different and alternative ground for the tentative decision.

[21] The basic policy of the I.C.C. Act which is against discrimination by carriers as between customers is such and so strong that the publication section should be read to require the name of the customer to be disclosed when the carrier is attempting to give a certain customer a discounted rate.

A competitor of that customer who is thus being discriminated against could conceivably do something abut it if he knows the name of the customer being benefited, if he knows that his competitor has the benefit of a separate lower rate. But when that competitor is kept in the dark by the use of coded numbers, his remedies are far less effective.

Now, there is a useful decision about the publication requirement and the public policy behind it that I think also supports this alternative ground. The case is called Regular Common Carrier Conference versus I.C.C., decided by the D.C. Circuit in '86, found at 793 F.2d 376, and the author of that case after writing it got a promotion. He is now Mr. Justice Scalia.

I want to take a break here now for the benefit of the reporter and to conduct some proceedings in a case in which a jury is out deliberating. We will excuse you folks for 15 minutes. You can leave your papers.

Assemble the jury in the box please, Mr. Clerk, and counsel in the case being deliberated, and I'll have something to say to them.

[22] THE CLERK: Please rise. Court in recess.

(Recess taken from 11:00 a.m. until 11:15 a.m.)

THE COURT: I have completed my exposition of my tentative decision. I'll hear from the commission now. How much time do you think you will need?

MR. DAY: I think no more than about 10 minutes, Your Honor.

THE COURT: Excuse me while I make some notes. Hold on one second, please. There are so many papers up here from the case in trial that I am finding it hard to get a pad. Go ahead.

MR. DAY: Your Honor, I would like to start first with the Maislin case. That case involved a situation where the Commission's regulations were trying to give effect to an unfiled rate. We think this case is not ruled by Maislin because we are not seeking to enforce an unfiled rate.

What we are doing and I think precisely the point covered is at footnote 11 in the Maislin case, where it says that none of their prior cases had involved a situation where they ignored the filed rate altogether. But it might be where the facts of the case would have one tariff provision prevail over another tariff provision. And we feel that's what we have here.

We feel that Transcon did attempt to take advantage of the credit regulations the Commission had entered under, [23] 10743 of the Interstate Commerce Act. It was an imperfect attempt and it took their situation from purely one of tariff to one where they chose to extend credit. They didn't have to. We agree with Mr. Ashworth there.

But they did so and in doing so, they become subject to the rules of the Commission. I think it's important to emphasize, Your Honor, that 10743 and the extension of credit was strictly regulated for the same reason that filed rates are: to avoid discrimination among shippers.

And I think that the credit regulations and the credit statute are equally as important as the filed rate. And I think the two statutes, 10761—

THE COURT: If you are arguing that the "regs" you are discussing here have a statutory basis, you can't distinguish Maislin, because the policy had a statutory basis in Maislin too.

MR. DAY: Yes, it did. I think the difference in Maislin though again is that we were trying to give effect to an unfiled rate and I think that really is the key to that case. I think that once we get beyond the fact that there was an unfiled rate in Maislin—and as we agree here today, we're talking about filed rates.

And so Maislin is really not on all fours with this case even though it involved a bankrupt carrier. There is that factual similarity. But what's different here is that [24] Transcon attempted to use our credit regulations to recoup their collection costs. It was one of the methods they chose. And they did publish a tariff item. We think the item is—

THE COURT: I'm lost a little bit. You say they were attempting to use your credit regulations. They were attempting to use the loss of discount provisions of the rates they filed. Isn't that correct?

MR. DAY: I don't think so, Your Honor. I think that Transcon published that item to meet the changes in the 1988 regulations.

THE COURT: Whatever may have been their motive, it's part of a filed rate; isn't it?

MR. DAY: It is part of the filed rate, Your Honor.

THE COURT: Okay. It's hard to say they are not relying on the filed rate when they are.

MR. DAY: But they're barred from using that provision because they didn't do the rest of the things required for them to use it.

THE COURT: I think I have apprehended the real issue in this case. I think my remarks demonstrate that. And I have indicated to you that in my view the regulations—which are as you say they are and would prevent what is being done—are no more valid as against the filed rate doctrine than was the published policy in Maislin.

MR. DAY: If I could take one more cut at it, Your [25] Honor?

THE COURT: Sure.

MR. DAY: I think what we are talking about is 10762 and 10743, the credit regulation. The credit

regulation or the credit statute—excuse me. The credit statute clearly says that the commission may have rules governing credit. The carriers cannot extend credit except pursuant to those rules.

So what we have done is publish rules concerning credit. Transcon did extend credit and in doing so, it moved into that environment, that regulatory environment, subject to those rules. It can't now come back and say, well, we were going to do the rest of the things, but it's imperfect and say, well, but we think that the tariff is the end all/be all to the question.

Once they started into that regulatory environment, they're bound by those regulations and they're barred from cancelling that discount.

THE COURT: Let me ask you before you finish to discuss the second alternative ground also.

MR. DAY: Well, the second alternative ground, Your Honor, is a problem because I think that the trustee cannot be relieved from those discounts unless it comes before the commission and gets relief. It seems that that argument—and we argued this in our brief—but that's really a primary jurisdictional question. The commission must look at that [26] first.

We read the regular common carrier conference case to say that a rate must be—

THE COURT: I'm sorry. Which case again?

MR. DAY: The regular common carrier conference case that Your Honor cited.

THE COURT: Oh, yes. All right. Go ahead.

MR. DAY: We believe that case says simply that a rate must be identified and that's all that was involved in that case.

In this case the rates are identified; albeit, there is a shipper code. There may be commercial—

THE COURT: I don't follow you very well. The second ground rests upon the publication requirements of the statute. Those are statutory. And if rates are illegal, they're illegal; aren't they?

MR. DAY: But the trustee still has to comply with them until they get relief from the commission initially.

THE COURT: The court cannot adjudicate such illegality. Is that what you're saying?

MR. DAY: I think—well, of course—that's correct, Your Honor.

THE COURT: Well, all right. Now I want to hear from Mr. Ashworth. You might deal with this second ground first.

MR. ASHWORTH: Yes, Your Honor.

[27] THE COURT: Counsel says that this court cannot despite the statutory requirement of publication call any kind of a filed rate illegal. That has to be dealt with by the commission first.

MR. ASHWORTH: I'm happly to deal with that one first. The position of the statutory validity of a regulatory position, or in this case of a rate, is something to which courts always address themselves and they don't need to wait. And the perfect case to give you is Maislin itself.

When it addressed a policy of the commission, it didn't say we factually disagree with the commission. They didn't say they didn't think it through properly or any other thing that normally would go into reversing an I.C.C. decision.

They said the I.C.C. has gone left after the statute and you should have gone right. We have the exact situation here. When Transcon filed a rate—in this

case the 90-day disallowance rule, if you like—that was the rate on file with the commission.

The commission had a statutory power for 30 days or thereabouts—and I confess I don't remember the exact days, but it's 30 days or so—to suspend that rate unilaterally.

THE COURT: So acceptance by the commission was the end of their function. That's what you're saying?

MR. ASHWORTH: That's correct. Once it sits there, [28] it sits there. And now after the cat is out of the bag, although I hate to put Transcon as the bad guy in this. They are not. But once the cat is out of the bag, now the commission says we don't want Leonard Gumport to run around enforcing the filed rate. Because if we had thought about it 10 years ago, we would have done something about it.

THE COURT: All right. Why don't you pass to a discussion of the first enunciated ground and the attempted distinction of Maislin by the commission.

MR. ASHWORTH: Yes. Actually, Mr. Day made two arguments, and I think I'll handle them in the order that you suggested and go at Maislin first. And that is that Mr. Day said that the Maislin case did not involve a second filed rate; rather that the negotiated rate between Maisin and its customer was a non-filed, non-published rate.

But that really begs the logical question. The court correctly pointed out during its tentative views that the aggregate of the filed rate is all of the building blocks which go into the filed rate—in this case including the 90-day disallowance provision or the 90-day condition precedent provision.

It is therefore not logically necessary to distinguish on the other hand what may not be enforced against

the carrier. The published rate in respect of any given shipment includes, among other things, the 90-day rule.

[29] So the Maislin case is precisely on point because conceptually and practically it deals with the identical question; i.e., can we have a published regulation or a published policy which operates in derogation of the filed rate doctrine enunciated in Maislin and literally a host of supreme court cases and most important linking the statute itself 49 U.S.C. section 10761(a)? I think the court correctly said that Maislin is what matters here.

THE COURT: Counsel made something of footnote 11. Do you know what that is?

MR. ASHWORTH: Footnote 11 in the Maislin case, if memory serves, Your Honor, says—

THE COURT: He has it there. You might take a look at it.

MR. ASHWORTH: And he is handing it to me just like a gentleman which he has been throughout, by the way.

THE COURT: The standard of presentation here—papers and argument—has been very high and I appreciate it.

MR. ASHWORTH: Thank you, Your Honor.

MR. DAY: Thank you, Your Honor.

MR. ASHWORTH: Yes. Note 11—let me quote it because then it makes it easier for us to deal with and there's a logistical problem which makes this easier. Note 11 says that:

> "None of our cases involving a [30] determination by the I.C.C. that the carrier engaged in an unreasonable practice as required to purchase from the filed rate schedule altogether, comma, instead they are required merely the application of a different filed tariff."

THE COURT: What is the court saying in that footnote?

MR. ASHWORTH: What the court is—thank you, Mr. Day.

What the court is saying in that footnote, Your Honor, is that it is perfectly legitimate for a shipper to say or the commission to say, hold it. We have a second rate. You guys forgot about that tariff and the other tariff you filed in 1916 and you never cancelled it. Here is another rate that applies to the same bale of cotton and so this is yet another filed rate. There is a well-developed doctrine of law where you end up with two pieces of filed tariff that seem to speak to the same bale of cotton.

THE COURT: And they're inconsistent.

MR. ASHWORTH: And they're inconsistent with one another. And that's not our fact problem here. That's just not the case. There is just lots of law on that, Your Honor, but it's just not our problem.

[31] THE COURT: Well, thank you. No further argument is necessary. The court now adopts the tentative decision. Summary judgment is granted to defendant. The commission's motion for summary judgment is denied. No legal basis is shown therefore. Legal basis is found to exist for defendant's motion.

I'll do my own judgments here, counsel, but I would like to have a transcript of the proceedings today in open court which I will incorporate by reference. Will you order that, please?

MR. ASHWORTH: Yes. In contemplation of that, Your Honor, the trustee has already authorized me to order a transcript for our expense and we'll do it.

THE COURT: Very well. And I will incorporate it by reference in the judgment.

Thank you again for a good job.

MR. ASHWORTH: With some trepidation I want to mention the related case and you mentioned it earlier. And I say "trepidation," because normally you don't want to hear about other cases. But the Winfield matter is coming up for motion. There is a motion for summary judgment which has been filed, and it contains an interim order suggested from me that there be a reference to a magistrate for nuts and bolts type of—

THE COURT: I'm sorry. I don't want to talk about a [32] motion in another case.

MR. ASHWORTH: I didn't think you would.

THE COURT: It's hard enough for me to deal clearly and expeditiously with this one and the other matters pending.

MR. ASHWORTH: Then I will back away.

THE COURT: Okay. Thank you.

MR. DAY: Your Honor—

THE COURT: I'm sorry. The matter is at a close. Is there something you have vital unrelated to the decision of the matter?

MR. DAY: Well, Your Honor, with equal trepidation just as a matter of proforma, I wonder if I might ask the court to reconsider the first part of its decision under Maislin.

THE COURT: No. That motion for reconsideration is denied. We'll be in recess.

MR. DAY: Thank you, Your Honor.

MR. ASHWORTH: Thank you, Your Honor.

THE BAILIFF: Please rise. Court is in brief recess.

(Proceedings adjourned at 11:30 A.M.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALFORNIA

Case No. CV-91-5036-IH

INTERSTATE COMMERCE COMMISSION

vs.

TRANSCON LINES, ET AL.

CIVIL MINUTES—GENERAL

Date 12/13/91

PRESENT:

HON. IRVING HILL, JUDGE
R. H. MAZZARELLA, Deputy Clerk

Attorneys present for Plaintiffs:

NO APPEARANCES

Attorneys present for Defendants:

NO APPEARANCES

NO APPEARANCES

PROCEEDINGS: IN CHAMBERS

Re: Plaintiff's Notice of Motion and Motion for Stay, Reconsideration, and Amendment of Judgment

No hearing is necessary.

Said motion has been considered by the court and is denied.

No reply is necessary.

/s/ Illegible
Initials of Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV91-5036-IH

INTERSTATE COMMERCE COMMISSION, PLAINTIFF

v.

TRANSCON LINES, ET AL., DEFENDANTS

SUMMARY JUDGMENT FOR DEFENDANTS AND DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[Filed November 25, 1991]

There came before the Court on November 25, 1991 for hearing reciprocal motions for summary judgment. Plaintiff's motion was filed November 8, 1991 and defendants' motion was filed October 29, 1991. Appearances were: For plaintiff, Stephen L. Day, Esq., Patricia Burke Kuhlmann, Esq. and Henri Rush, Esq., all of Washington D.C. and Jan Luymes, Esq., Assistant U.S. Attorney; for defendants, Garfield, Tepper, Ashworth & Epstein by Christopher Ashworth, Esq.

Counsel for both sides agreed that the matter was ripe for summary judgment, i.e., that there was no bona fide dispute of material fact to preclude judgment for one side or the other and the sole issue was as to a matter of law and that summary judgment could properly be entered for one side or the other at this time.

The Court, having considered the evidence and the points and authorities filed in support of each motion and in opposition thereto, and having heard argument, announced that plaintiff's motion for summary judgment would be denied, plaintiff not having shown legal entitlement thereto. The Court further announced that defendants' motion for summary judgment would be granted, defendants having shown legal entitlement to the grant thereof.

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff's motion for summary judgment is denied.

2. Defendants Transcon Lines, a corporation, and Leonard Gumport, Chapter 7 Trustee, shall have judgment against plaintiff Interstate Commerce Commission with costs of $————. Plaintiff Interstate Commerce Commission shall take nothing by its complaint against defendants.

3. A transcript of the procedings in open court on November 25, 1991, is ordered filed when produced. It is incorporated herein by reference. The transcript shall constitute the Court's further findings of fact and conclusions of law as well as a statement of the Court's reasons.

4. The Clerk shall transmit a copy of this judgment by U.S. mail to al counsel of record.

DATED: November 25, 1991.

/s/ Irving Hill
IRVING HILL, Judge
United States District Court

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55036

DC# CV-91-5036 (Tx)

INTERSTATE COMMERCE COMMISSION,
PLAINTIFF-APPELLANT

vs.

TRANSCON LINES, a corporation; LEONARD L. GUMPORT, Chapter 7 Trustee, DEFENDANT-APPELLEE

[Filed November 25, 1992]

Before: BOOCHEVER, NORRIS and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing filed on July 6, 1992, August 3, 1992, and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing filed on July 6, 1992, and August 3, 1992 are denied, and the suggestions for a rehearing en banc are rejected.

APPENDIX H

Title 49, United States Code

§ 10743. Payment of rates

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.

(b)(1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service. The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers.

(2) Such a carrier (including a motor common carrier being used by a household goods freight forwarder) may extend credit for transporting property for the United States Government, a State, a territory or possession of the United States, or a political subdivision of any of them.

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission un-

der chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Com-

mission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly—

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

* * * * *

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action—

(1) to enjoin a rail carrier from violating section 10901-10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;

(2) to enforce section 10527 or 10930 or 11109 or 11111 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchapter;

(3) to enforce an order of the Commission, except a civil action to enforce an order for the payment of money, when it is violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title;

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a foreign motor carrier or foreign motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title;

(5) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle, except a civil action to enforce an order for the payment of money, when violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title; and

(6) to enforce this subtitle, or a regulation or order of the Commission or permit issued under this subtitle when violated by a carrier providing service subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title.

(b) In a civil action under subsection (a)(4) of this section—

(1) trial is in the judicial district in which the motor carrier, foreign motor carrier (as defined under section 10530(a)), foreign motor

private carrier (as defined under section 10530 (a)), or broker operates;

(2) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(3) a person participating with a carrier or broker in a violation may be joined in the civil action without regard to the residence of the person.

Title 49, Code of Federal Regulations

PART 1320—EXTENSION OF CREDIT TO SHIPPERS BY RAIL COMMON CARRIERS, MOTOR COMMON CARRIERS, WATER COMMON CARRIERS, AND HOUSEHOLD GOODS FREIGHT FORWARDERS

Sec.

1320.1 Scope.
1320.2 Extension of credit to shippers.
1320.3 Presentation of freight bills.
1320.4 Effect of mailing freight bills or payments.
1320.5 Additional charges.
1320.6 Computation of time.
1320.7 Charges under average demurrage agreements.
1320.8 Household goods shipments by motor common carriers.
1320.9-1320.16 [Reserved]
1320.17 Interline settlement of revenues.

AUTHORITY: 5 U.S.C. 553 and 49 U.S.C. 10321, 10701, 10702, 10741, 10743, and 10744.

SOURCE: 50 FR 2290, Jan. 16, 1985, unless otherwise noted.

§ 1320.1 Scope.

(a) *General.* These regulations apply to the extension of credit in the transportation of property under Interstate Commerce Commission regulation by rail, motor, and water carriers and household goods freight forwarders, except as otherwise provided.

(b) *Exceptions.* These regulations do not apply to—

(1) Contract carriage operations.

(2) Transportation for—

(i) The United States or any department, bureau, or agency thereof,

(ii) Any State, or political subdivision thereof,

(iii) The District of Columbia.

(3) Property transportation incidental to passenger operations.

[50 FR 2290, Jan. 16, 1985, as amended at 51 FR 44297, Dec. 9, 1986]

§ 1320.2 Extension of credit to shippers.

(a) *Authorization to extend credit.* (1) A carrier that meets the requirements in paragraph (a)(2) of this section may—

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called *shippers* in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified—

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) *When the credit period begins.* The credit period shall begin on the day following presentation of the freight bill.

(c) *Length of credit period.* Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) *Carriers may establish different credit periods in tariff rules.* Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

(e) *Service charges.* (1) Service charges shall not apply when credit is extended and payments are made within the standard credit period. The term *standard credit period*, as used in the preceding sentence, means—

(i) The credit period prescribed in paragraph (c) of this section, or

(ii) A substitute credit period published in a tariff rule pursuant to the authorization in paragraph (d) of this section.

(2) Carriers may, by tariff rule, extend credit for an additional time period, subject if they wish to a service charge for that additional time. The combined length of the carrier's standard credit period (as defined in paragraph (e)(1) of this section) and its additional credit period shall not exceed the 30-day maximum credit period prescribed in paragraph (d) of this section. When such a tariff rule is in effect, shippers may elect to postpone payment until the end of the extended credit period if, in consideration therefor, they include any published service charges when making their payment.

(3) Carriers may, by tariff rule, establish service charges for payments made after the expiration of an authorized credit period. Such a rule shall—

(i) Institute such charges on the day following the last day of an authorized credit period, and

(ii) Notify shippers—

(A) That its only purpose is to prevent a shipper who does not pay on time from having free use of funds due to the carrier,

(B) That it does not sanction payment delays, and

(C) That failure to pay within the authorized credit period will, despite this provision for such charges, continue to require the carrier, before again extending credit, to determine in good faith whether the shipper will comply with the credit regulations in the future.

(4) Tariff rules that establish charges pursuant to paragraph (e)(2) or (3) of this section may establish minimum charges.

(f) *Discounts.* Carriers may, by tariff rule, authorize discounts for early freight bill payments when credit is extended.

(g)(1) *Collection expense charges.* Carriers may, by tariff rule, assess reasonable and certain liquidated damages for all costs incurred in the collection of overdue freight charges. Carriers may use one of two methods in their tariffs:

(i) The first method is to assess liquidated damages as a separate additional charge to the unpaid freight bill. In doing so, the tariff rule shall disclose the exact amount of the charges by stating either a dollar or specified percentage amount (or a combination of both) of the unpaid freight bill. The tariff shall further specify the time period (which shall at least allow for the authorized credit period) within which the shipper must pay to avoid such liquidated damages.

(ii) The second method is to require payment of the full, nondiscounted rate instead of the discontinued rate otherwise applicable. The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort. Under this method the tariff shall identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain. The date certain may not be set to occur by the carrier until at least after the expiration of the carrier's authorized credit period.

(2) The damages, the timing of their applicability, and the conditions, if any, as provided by the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section also:

(i) Shall be clearly described in the tariff rule;

(ii) Shall be applied without unlawful prejudice and/or unjust discrimination between similarly situated shippers and/or consignees;

(iii) Shall be applied only to the non-payment of original, separate and independent freight bills and shall not apply to aggregate *balance-due* claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent;

(iv) Shall not apply to instances of clear clerical or ministerial error such as non-receipt of a carrier's freight bill, or shipper's payment check lost in the mail, or carrier mailing of the freight bill to the wrong address;

(v) Shall not apply in any way to a charge for a transportation service if the carrier's bill of lading independently provides that the shipper is liable for fees incurred by the carrier in the collection of freight charges on that same transportation service;

(vi) shall be applied only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period.

(3) As an alternative to the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section, a carrier may, wholly outside of its tariff, assess collection charges though [*sic*] contract terms in a bill of lading. By using the carrier and its bill of lading, the shipper accepts the bill of lading terms.

(h) *Discrimination prohibited.* Tariff rules published pursuant to paragraphs (a), (e), and (f) of this section shall not result in unreasonable discrimination among shippers.

[50 FR 2290, Jan. 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

§ 1320.3 Presentation of freight bills.

(a) *"To be prepaid" shipments.* (1) On "to be prepaid" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (a)(2) of this section, except—

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the carrier received the shipment. This time period does not include Saturdays, Sundays, or legal holidays.

(b) *"Collect" shipments.* (1) On "collect" shipments, the carrier shall present its freight bill for

all transportation charges within the time period prescribed in paragraph (b)(2) and of this section, except—

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the shipment was delivered at its destination. This time period does not include Saturdays, Sundays, or legal holidays.

(c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge and/or collection expense charge and discount terms.* When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penalties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and any applicable service charge and/or collection expense charge and discount terms.

(d) *When the carrier lacks sufficient information to compute tariff charges.* (1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its freight bill for payment within 7 days following the day upon which sufficient information becomes available at the billing point. This time period does not include Saturdays, Sundays, or legal holidays.

(2) A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier.

(3) As used in this paragraph, the term "shipper" includes, but is not limited to, freight forwarders, and shippers' associations and shippers' agents within the meaning of 49 U.S.C. 10562(3) and (4).

(e) *Freight bill presentation on railroad transported export traffic loaded into vessels.* The term *delivered at its destination* as used in paragraph (b)(2) of this section shall mean the time when the vessel is completely loaded, when—

(1) The traffic in export traffic that is loaded into vessels either—

(i) Direct from railroad cars or piers, or

(ii) From such cars or pirers [*sic*] by means of lighters, and

(2) The freight bills are presented to vessel owners or their representatives.

[50 FR 2290, Jan. 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

* * * * *

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No. 93-1318

Supreme Court, U.S.
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MAR 18 1994
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In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the filed rate doctrine and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the ICC has the authority to prevent a carrier from collecting its concededly duly filed and lawful tariff rate solely on the ground that the carrier failed to comply with the ICC's non-tariff credit regulations.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Statutes and Regulations Involved	2
Statement of the Case	3
Summary of Reasons for Denying the Writ	8
Reasons Why Writ Should Be Denied	10
Conclusion	22
Appendix	1a

TABLE OF AUTHORITIES

Page

CASES

Gumport v. ICC, 113 S.Ct. 2907 (1993) 6

ICC v. Transcon Lines, 113 S.Ct. 2955 (1993) 7

ICC v. Transcon Lines, 9 F.3d 64 (9th Cir. 1993) 7

Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922) 10

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) ..... *passim*

Reiter v. Cooper, 507 U.S. ___, 113 S.Ct. 1213 (1993) *passim*

Security Services, Inc. v. K Mart Corp., No. 93-284 (argued February 28, 1994) 9, 15

Southern Pacific Transp. Co. v. Commercial Metals, 456 U.S. 336 (1982) ..... *passim*

White v. ICC, 989 F.2d 643 (3d Cir. 1993) 13

ADMINISTRATIVE DECISIONS

Nonoperating Motor Carriers – Collection of Undercharges, 8 I.C.C. 2d 742 (1992) 13

STATUTES

49 U.S.C. § 10701(a) 11, 18, 20

49 U.S.C. § 10743 19

49 U.S.C. § 10743(b) 20

49 U.S.C. § 10743(b)(1) 18, 19

49 U.S.C. § 10761 11

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 10762 ..... 11, 19, 20

49 U.S.C. § 10762(a)(1) 5

49 U.S.C. § 11702 ..... 18, 19

49 U.S.C. § 11702(a)(4) 6, 19, 20

49 U.S.C. § 11702(a)(6) 6

49 U.S.C. § 11705(b)(3) 8, 18

49 U.S.C. § 11906 ..... 2, 14

49 U.S.C. § 11914 ..... 2, 14

REGULATIONS

49 C.F.R. § 1322 4

49 C.F.R. § 1320 2

49 C.F.R. § 1320.2(g)(1)(ii) 4

49 C.F.R. § 1320.2(g)(2)(iii) 5

49 C.F.R. § 1320.2(g)(2)(vi) 4

49 C.F.R. § 1320.3(c) 4

MISCELLANEOUS

Hearing On The Negotiated Rates Issue And Proposed Legislative Solutions Thereto, 103rd Cong., 1st Sess., H.R. Doc. No. 103-18 (June 15, 1993) 15

No. 93-1318

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Transcon Lines ("Transcon") and Leonard L. Gumport, Chapter 7 Trustee ("Trustee") for the Estate of Transcon Lines, hereby request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit by Petitioner, Interstate Commerce Commission ("ICC") be denied.

STATUTES AND REGULATIONS INVOLVED

In addition to the provisions of the Interstate Commerce Act ("Act"), 49 U.S.C. § 10101, *et seq.* and the ICC's credit regulations, 49 C.F.R. § 1320, set forth by Petitioner in its Appendix (Pet. App. 74a-87a), Respondents believe the following additional statutory provisions are involved:

49 U.S.C. § 11906 Evasion of regulation of motor carriers and brokers.

A person, or an officer, employee, or agent of that person that by any means knowingly and willfully tries to evade regulation provided under this subtitle for motor carriers or brokers shall be fined at least $200 but not more than $500 for the first violation and at least $250 but not more than $2,000 for a subsequent violation.

49 U.S.C. § 11914(b) General criminal penalty when specific penalty not provided.

(b) When another criminal penalty is not provided under this chapter, a person that knowingly and willfully violates a provision of this subtitle or a regulation or order presented under this subtitle, or a condition of a certificate or permit issued under this subtitle related to transportation that is subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, shall be fined at least $100 but not more than $500 for the first violation and at least $200 but not more than $500 for a subsequent violation. A separate violation occurs each day the violation continues.

STATEMENT OF THE CASE

This case, which comes before this Court for a second time on the same grounds, involves a suit by the ICC to enjoin Respondents, Transcon and its bankruptcy trustee, Leonard L. Gumport, from collecting Transcon's concededly duly filed and lawful tariff charges. The ICC contends that the Trustee cannot collect Transcon's filed rates solely because Transcon, while an active carrier, had violated certain billing requirements set forth in the ICC's credit regulations. The ICC admits that Transcon's tariff provision at issue was part of Transcon's duly filed rates and fully complied with all ICC regulations – including its credit regulations. The ICC also concedes that pursuant to this Court's decision in *Southern Pacific Transp. Co. v. Commercial Metals,* 456 U.S. 336 (1982), shippers cannot raise Transcon's violation of the ICC's credit regulations as a defense to prevent the Trustee from collecting Transcon's filed rates. Nonetheless, the ICC maintains that by utilizing its "enforcement" powers the ICC may relieve shippers from their statutory obligation to pay Transcon's filed rate by enjoining the Trustee's collection efforts.

The tariff provision at issue provided that discounts from Transcon's base rates were conditioned upon a shipper's paying the discounted rate within ninety days of shipment. Failure by a shipper to pay the discounted rate within that time period resulted in the requirement that the shippers pay the undiscounted tariff rate.[1]

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[1] Transcon's loss-of-discount tariff rule provided in relevant part:

In the proceedings below, the ICC admitted that Transcon's loss-of-discount provision was authorized by, and fully complied with the ICC's regulations. *See* 49 C.F.R. § 1320.2(g)(1)(ii), Pet. App. 57a-58a, 83a-84a, Opp. App. 1a-2a.[2] *Infra*, pp. 15-16.

The Trustee admitted that Transcon did not comply with certain other provisions of the regulations which did not involve Transcon's tariffs. First, the ICC claimed, and the Trustee did not dispute, that Transcon failed to specifically state its loss-of-discount penalty in its original freight bills as required by 49 C.F.R. § 1320.3(c). Second, Transcon did not issue revised freight bills that included the undiscounted charges as "liquidated damages" within ninety days after the expiration of the authorized credit period as required by 49 C.F.R. § 1320.2(g)(2)(vi). Third, Transcon had not sent out individual bills to shippers seeking to apply the loss-of-discount penalty, and

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1. Allowances, discounts, exception classes and commodity rates shall apply only when tariff charges are paid within ninety calendar days from date of shipment.
2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 C.F.R. 1322. This rule simply establishes a condition precedent for the application of the special tariff provisions described in paragraph 1 above.

(Vol. I, Resp. C.A.E.R. 41 (ICC TCON 103-A, Item 210)).

[2] Citations to the appendix submitted with the Petition are referred to as "Pet. App. ___;" citations to the appendix submitted with this Brief in Opposition are referred to as "Opp. App. ___."

the Trustee, out of necessity, applied the loss-of-discount provision by aggregating freight bills in violation of 49 C.F.R. § 1320.2(g)(2)(iii).

The Trustee argued that the ICC's credit regulations could not be used to prevent his collection of Transcon's filed rate based upon this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). As a second ground for denying the injunction, the Trustee claimed that Transcon's entire discount scheme was illegal because the discounts were masked by secret numerical codes. Without a filed "key" to the shipper codes the discounts were not "published" as required by the Act, specifically 49 U.S.C. § 10762(a)(1). The Trustee, therefore, claimed that the ICC could not compel him to adhere to these discounts.

The district court agreed with the Trustee on both grounds. The trial court held that (1) the ICC's credit regulations could not be enforced so as to prevent operation of the statutory filed-rate doctrine, Pet. App. 56a-58a, and (2) the discounts to the extent they failed to reveal the identity of the customers to whom they applied violated the publication requirement of the Act and, therefore, could not be enforced. Pet. App. 58a-60a. Thereupon, the district court denied the ICC's motion for summary judgment, and granted the Trustee's cross motion for summary judgment, dismissing the case. Pet. App. 67a, 69a-72a.

The ICC timely filed an appeal to the Ninth Circuit. On appeal, the Ninth Circuit affirmed the district court's judgment with regard to the dismissal of the ICC's injunction for Transcon's credit rules violation, but

reversed for lack of standing the Trustee's challenge to the secretly coded tariffs. Pet. App. 10a-40a. This Court denied the Trustee's petition for writ of certiorari seeking to review the court of appeals' standing holding. *See Gumport v. ICC*, 113 S.Ct. 2907 (1993).

The court of appeals recognized that the ICC is authorized by statute to bring a civil action to enforce its regulations against motor carriers, including the trustees of bankrupt motor carriers. Pet. App. 26a. This enforcement power includes the "general" power to seek an injunction pursuant to 49 U.S.C. § 11702(a)(4) and (a)(6). Pet. App. 31a. However, the court of appeals said the ICC could not use its "general" injunctive power to enforce regulations in such a way as to undercut the "utterly central" filed rate requirement. Pet. App. 26a. "Regulations, however valid in other contexts, cannot furnish the reason for letting a carrier abandon the filed rate." Pet. App. 32a. The court of appeals found that the ICC improperly sought to enforce its credit regulations in such a way that encourages and endorses "circumventing the filed rate requirement, for it would prevent the Trustee from collecting the bureau rates in accordance with all of its filed tariffs." *Id.* The court of appeals concluded that if the ICC's injunctive action against the Trustee's filed rate was allowed to stand, " 'the ICC [would permit] the very price discrimination the Act by its terms seeks to prevent'." *Id.* quoting *Maislin*, 497 U.S. at 130.

The ICC's broad interpretation of its credit regulations was rejected by the court of appeals as of no greater force and effect than the *Negotiated Rates* policy rejected by this Court in *Maislin*. The court of appeals, therefore,

affirmed the district court's judgment in favor of the Trustee as to the collection of Transcon's filed rates on overdue accounts. *Id.* at 40a.

The ICC filed a petition for writ of certiorari that argued that the court of appeals' decision conflicted with this Court's recent decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). The ICC claimed the court of appeals did not have the benefit of the *Reiter* decision. On this basis, the ICC requested this Court to vacate the court of appeals decisions for further consideration in light of *Reiter*. Alternatively, the ICC suggested that summary reversal was warranted in view of this Court's decision in *Commercial Metals, supra*, 456 U.S. 336 (1982). On June 14, 1993, this Court granted certiorari and remanded for further consideration in light of *Reiter*. *See ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993).[3]

The court of appeals, on remand, concluded that *Reiter* did not require a reversal of its prior judgment. *See ICC v. Transcon Lines*, 9 F.3d 64 (9th Cir. 1993). The court of appeals noted that *Reiter* addressed a problem of "timing" that had arisen out of the interplay between the filed rate doctrine and claims and defenses to the filed rate doctrine "specifically accorded by the Interstate Commerce Act". Pet. App. 2a-3a. The shippers in *Reiter* raised as a defense the specific statutory right accorded to them by the Act to claim damages, called reparations, for the

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[3] This Court did not summarily reverse the lower court opinion based upon *Commercial Metals*, nor did this Court even suggest that the court of appeals consider its judgment in light of *Commercial Metals*. Nevertheless, the ICC again seeks that relief.

imposition of allegedly unreasonable filed rates. *See* 49 U.S.C. § 11705(b)(3). As held by this Court in *Maislin*, if the filed rate was found by the ICC to be unreasonable it was "not enforceable." *Maislin*, 497 U.S. at 129. *Reiter* allowed a shipper to plead rate unreasonableness as a counterclaim and (under certain circumstances) avoid paying the filed rate while the ICC determined what, if any, reparations were owed by the carrier. 113 S.Ct. at 1221. In *Commercial Metals*, however, this Court had already determined that the Act does not specifically accord a claim or defense to a shipper on the basis of a carrier's violation of the ICC's credit rules. Therefore, the court of appeals held that *Reiter* did not apply to the facts of this case. Pet. App. 4a.

The court of appeals also held on remand that, even if the ICC's general enforcement powers could be considered a "claim accorded to the ICC" (as opposed to shippers) by the Act, *Maislin* required that any perceived conflict between two statutory provisions be resolved in favor of enforcing the "utterly central" provisions of the filed rate doctrine. Pet. App. 8a-9a. The court of appeals thus held, as it had previously, that the ICC could not use its injunctive powers to prevent the collection of a lawful and duly filed common carrier rate.

SUMMARY OF REASONS FOR DENYING THE WRIT

The writ should be denied for the following reasons:

1. *Commercial Metals* does not support the ICC's request for summary reversal as this Court has never held that the ICC may use its enforcement powers to prevent the collection of a carrier's concededly duly filed and lawful rate. The court of appeals' decision explains this. *See* Pet. App. 4a-5a, and 7a.

2. *Reiter* also does not support the ICC's request for summary reversal as this Court has never held that the ICC's general statutory enforcement powers and right to regulate carrier credit are "claims and defenses" to the filed rate doctrine "specifically accorded" by the Interstate Commerce Act. The court of appeals' decision explains this. *See* Pet. App. 3a, 5a, and 8a.

3. The court of appeals' decision does not prevent the ICC from fully enforcing its credit regulations to ensure carrier compliance. The decision only prevents the ICC from relieving shippers of their statutory duty to pay the carrier's concededly duly filed and lawful rate. Any carrier and/or its employees who violate the ICC's credit regulations remain subject to all civil and criminal penalties provided by the Act. The court of appeals' decision explains this. *See* Pet. App. 6a-7a.

4. There is no circuit split with respect to the court of appeals' decision. The initial court of appeals' decision explains this. *See* Pet. App. 33a. The ICC does not claim in its petition that there is need for this Court to resolve any conflicting circuit decisions.

5. The ICC also admits that the "filed rate doctrine" issue under consideration by this Court in *Security Services, Inc. v. K Mart Corp.*, No. 93-284 (argued Feb. 28, 1994) "involves different principles," and review by this Court is therefore not necessary to resolve any potentially

conflicting jurisprudence. *See* Pet. at 16-17 n.11.[4] Specifically, the tariff involved in Transcon's case was and is concededly duly filed and lawful. The ICC admitted this both in the district court and in the court of appeals. *See* Pet. App. 57a-58a, Opp. App. 1a-2a.

REASONS WHY WRIT SHOULD BE DENIED

The ICC, citing *Commercial Metals*, concedes in its petition that "[a] shipper cannot raise the carrier's violation of the credit regulations in defense to an action to collect the filed rate." Pet. at 6. Despite this concession, the ICC believes that it may afford a shipper complete relief from its legal obligation to pay the carrier's filed rate if the carrier fails to otherwise comply with the ICC's non-tariff credit regulations. The ICC claims it must have the ability to prevent collection of the filed rate when credit regulation violations have occurred so as to "limit the impairment of shipper confidence in the regulated trucking industry that such violations have caused." Pet. at 18. Yet, as repeatedly recognized by this Court, "the filed rate governs the legal relationship between shipper and carrier." *Maislin*, 497 U.S. at 126. Moreover, "[u]nless and until suspended or set aside, [the published tariff] is made for *all purposes*, the legal rate, as between carrier and shipper." *Id.*, quoting *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922) (emphasis supplied).

[4] Citations to the petition for writ of certiorari are referred to as "Pet. at ___."

In *Maislin*, this Court rejected the same argument made by the ICC here. That is, the ICC had attempted to justify its *Negotiated Rates* policy "as a remedy for the carrier's failure to comply with § 10762's directive to file the negotiated rate with ICC." *Maislin*, 497 U.S. at 131. In *Maislin* the Commission argued "that the carrier should not receive a windfall, i.e., the higher filed rate, from its failure to comply with the statute." *Id.* Rejecting this analysis, this Court found that "§ 10761 *requires* the carrier to collect the filed rate, and we have never accepted the argument that such 'equities' are relevant to the application of § 10761." *Id.* (emphasis original).

The court of appeals thus correctly told the ICC what it was told previously by this Court in *Maislin*: The ICC has no right to enforce regulations in such a manner as to prevent carriers from enforcing their duly filed tariffs. Pet. App. 7a. In *Maislin*, the ICC asserted that its express statutory power to prohibit "unreasonable practices" pursuant to 49 U.S.C. § 10701(a) permitted it to prohibit a carrier from enforcing its filed tariff. As here, the ICC claimed in *Maislin* that it had the power to waive the collection of the filed rate in those cases where denial of collection of the filed rate was necessary to deter improper carrier conduct. This Court recognized that the carrier's practice of negotiating and billing unfiled rates was illegal and that the ICC had the power to subject the carrier to civil and criminal penalties, *Maislin*, 497 U.S. at 120. But this Court still held that the ICC could not prevent the carrier, or its bankruptcy trustee, from collecting the filed tariff rate. This Court explained: (1) the filed-rate doctrine is "utterly central" to the Interstate Commerce Act, so that (2) the ICC has no power to adopt

rules "sanctioning adherence to unfiled rates. . . . " *Maislin*, 497 U.S. at 132.

Notwithstanding the clear directive of *Maislin*, the ICC asserts that this Court's decision in *Reiter v. Cooper*, *supra*, is controlling with regard to the ICC's ability to prevent a carrier from collecting its filed rate. "[T]he filed rate doctrine 'does *not* preclude avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself.' " Pet. at 9, quoting *Reiter*, 113 S.Ct. at 1219 (emphasis in original). However, the specific "claims and defenses" to the filed rate doctrine referred to by this Court in *Reiter* were those raised by "shippers," and as the ICC correctly notes *Southern Pacific Transportation Co. v. Commercial Metals*, *supra*, provides that a shipper cannot raise the carrier's violation of the ICC's credit regulations in defense of an action to collect the filed rate. Pet. at 6. The court of appeals reviewed *Reiter's* plain holding and properly found that it did not alter the result in its prior opinion because the Act "does not specifically accord a claim or defense to the shipper on the basis of credit regulation violations." Pet. App. 4a. *Reiter* and *Commercial Metals* thus provide no assistance to the ICC's attempt to forge an end run around *Maislin*.

The court of appeals' judgment in this case no more vitiates the ICC's statutory power and right to regulate motor carrier credit than *Maislin* vitiated the ICC's statutory power and right to regulate motor carrier practices. The ICC continues to be free to regulate the credit practices of all carriers throughout the United States, including those within the Ninth Circuit. The ICC may, and should, issue cease and desist orders and seek injunctions

against carriers and their employees who violate its credit regulations as well as its other regulations promulgated pursuant to the Act. As noted by this Court in *Commercial Metals*:

> The ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes the power to issue a cease-and-desist order, the power to seek a federal-court injunction requiring the carrier to comply with the regulations, and the power to bring suit for the $5,000.00 civil forfeiture, provided by the [the Act], for each knowing violation of an order of the Commission.

456 U.S. at 349-50 (citations omitted).[5]

The ICC correctly notes that it is too late to enjoin Transcon from violating the billing portion of its credit regulations since the carrier is no longer operating. The ICC attempts to "bootstrap" its failure to enforce its credit regulations against Transcon at the time it was operating into a right to enforce them retroactively by preventing the Trustee from collecting filed rate charges. The ICC misconstrues its injunctive powers. It is axiomatic that one cannot use injunctive powers to prevent conduct that has already occurred. As noted by the court

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[5] The Third Circuit in *White v. ICC*, 989 F.2d 643 (3d Cir. 1993) rejected the ICC's attempt to utilize *Commercial Metals* to justify interfering with the collection of filed tariff charges by the bankruptcy trustee. In *White*, the Third Circuit set aside ICC regulations promulgated in *Nonoperating Motor Carriers – Collection of Undercharges*, 8 I.C.C. 2d 742 (1992). These illegal regulations operated to enjoin trustees from proceeding with undercharge actions unless approved by the ICC.

of appeals, the Commission, however, is not powerless to enforce its credit regulations. The Commission "has at its disposal a wide array of tools for enforcing its credit regulations". Pet. App. 6a. These "tools" include fines for knowing and willful violations of its orders and regulations. *See* 49 U.S.C. §§ 11906 and 11914.[6] The ICC dismisses these additional remedies by claiming incorrectly that they are limited to "operating carriers," or "presuppose a continuing violation." Pet. at 15. The ICC claims instead that the "most logical and effective remedy for the ICC [to enforce its credit regulations] is to deny the Trustee the power to exact additional charges from shippers, . . . " *Id.* While the ICC may have "discretion to draft appropriate remedies for violations of the statute," the "remedy" may not conflict with the "core purposes of the Act." *Maislin*, 497 U.S. at 133. The ICC can point to no provision within the Act that allows it to utilize its

[6] 49 U.S.C. § 11906 states that "a person, or an officer, employee, or agent of that person that by any means knowingly and willfully tries to evade regulation provided under [the Act] of motor carriers . . . shall be fined at least $200 but not more than $500 for the first violation and at least $250 but not more than $2,000 per subsequent violation." 49 U.S.C. § 11914 provides for similar criminal penalties for a person who violates the Act or a regulation or order of the ICC. The ICC thus could ascertain who at Transcon was responsible for failing to comply with the credit regulations and seek to enforce civil and criminal forfeitures against those individuals. The ICC could also find out if these individuals are still engaged in the trucking industry and if so enjoin them from future credit rule violations. This type of enforcement would send a strong message to ongoing carriers to comply with the regulations, while not disturbing the "utterly central" requirement that carriers collect and shippers pay filed tariff rates.

injunctive powers to prevent the collection of a concededly duly filed and lawful common carrier rate. Lacking statutory support, the ICC's belief that its enforcement powers need enhancement to prevent carrier filed rate collection efforts is a matter for Congress, and not the courts to address.[7]

The ICC also characterizes this case as involving a dispute as to which of two filed rates would apply. Pet. at 15-16. The ICC is wrong. The court of appeals correctly recognized that it was confronted with an unambiguous, legally filed tariff: "there is a single filed tariff governing here: the rules tariff providing that the discount lasts only for 90 days after the date of shipment and that timely payment is a precondition of the discount." Pet. App. 33a.

At argument before the Ninth Circuit the ICC's counsel, Mr. Rush, conceded that Transcon's loss-of-discount tariff provision was lawful and fully complied with the credit regulations.[8]

[7] The ICC at a hearing which led to the passage of the Negotiated Rates Act of 1993, P.L. 103-180 ("NRA"), requested that Congress amend the Act to provide it with the power to enjoin carriers from collecting their filed rates when they violate the ICC's credit regulations. *See Hearing On The Negotiated Rates Issue And Proposed Legislative Solutions Thereto*, 103rd Cong., 1st Sess., H.R. Doc. No. 103-18 at p. 36 (June 15, 1993). As noted by the ICC, the NRA contains no such amendment and this case is unaffected by the new legislation. Pet. at 18 n.12.

[8] The ICC thus admits there is no similarity between this case and *Security Services, Inc. v. K Mart Corp.*, No. 93-284 (argued February 28, 1994), in which the carrier's tariff admittedly did not comply with the ICC's regulations. *See Pet. at 16 n. 11.*

THE COURT: Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading[?]

MR. RUSH: No. *We don't contend the tariff violated anything*. We contend that the tariff was one of the four things that had to be done in order to be released from the obligations to charge no more than the discounted rate.

Opp. App. 1a-2a, (emphasis supplied).

Before the district court the ICC's counsel, Mr. Day, also conceded that Transcon's "filed rate" included *all* of Transcon's filed tariffs:

THE COURT: For the purposes of interpreting *Maislin* and determining what the "filed rate" is, as the term is used in the filed-rate doctrine, I believe that the Defendant Trustee here is correct as it defines that term. Defendant defines the term "filed rate" to include *all* of Transcon's tariffs including class rates, bureau rates, rules tariffs, and discount rates.

Now, I would like to hear from you, Mr. Day, whether you take issue with that definition of the term "filed rate."

MR. DAY: Your honor –

THE COURT: Just that question.

MR. DAY: Just that question. No, *I don't take issue with that at all.*

Pet. App. at 57a-58a (emphasis added).

The ICC in its petition ignores these critical admissions of its counsel. Despite conceding that the loss-of-discount provision was lawful and part of Transcon's filed rate, the ICC now claims that its injunction would not require "departure from the tariff schedule entirely." Pet. at 15. This is nonsense. There is only one tariff rate applicable for shippers who paid after ninety days, and that rate is the undiscounted bureau rate. Thus, it is irrelevant that the ICC calls the loss-of-discount tariff provision a "credit term" or "liquidated damages". Pet. at 16. It is also irrelevant that the ICC claims that Transcon was able to publish a loss-of-discount provision solely because it had authorized the filing of such a tariff term in its credit regulations. Although the ICC remains free to authorize or prohibit the use of loss-of-discount tariffs, it cannot have it both ways: the ICC cannot authorize carriers to file loss-of-discount tariffs and simultaneously preclude carriers from enforcing those tariffs as required by *Maislin*.[9]

The ICC opines that because *Maislin* contains the caveat that the filed rate "is not enforceable if the ICC finds the rate to be unreasonable" (citing 497 U.S. at 128), a filed rate is "not enforceable" if the ICC finds that the

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[9] The court of appeals in its initial decision properly distinguished two unpublished circuit court decisions cited by the ICC that had affirmed the ICC's denial of undercharge claims based on admittedly illegal loss-of-discount tariff provisions. *See* Pet. App. 33a. Here it is conceded that Transcon's loss-of-discount tariff provision fully complied with the ICC's credit regulations and the ICC does not suggest that there is any circuit authority that would allow the ICC to prevent the collection of a concededly duly filed and lawful rate.

carrier violated its credit regulations. Pet. at 12-13 n.7. Of course, as this Court pointed out in *Reiter*, the exception for rate unreasonableness is limited to the "specifically accorded" statutory right of a shipper to seek reparations pursuant to 49 U.S.C. § 11705(b)(3):

> We can agree with respondents that this latter category does not include any "unreasonable-rate defense," derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be "reasonable." But we cannot agree that the filed rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

113 S.Ct. at 1219 (italics in original) (citation omitted).

By misapplying *Reiter* to this case, the ICC argues that it can enjoin the Trustee's collection of Transcon's filed rate because the Act gives it the *general* authority to adopt credit regulations, *see* 49 U.S.C. § 10743(b)(1) (prohibiting credit transactions except as authorized by ICC regulations), and the *general* authority to bring a civil action to enforce its regulations, *see* 49 U.S.C. § 11702. The ICC made the same argument in *Maislin*, but utilized instead its statutory power to regulate "unreasonable practices," provided by 49 U.S.C. § 10701(a) requiring carrier practices to be reasonable. As in *Maislin*, the ICC's argument here is without merit.

First, contrary to the position taken by the ICC, *Reiter* reaffirms the principle that the Act's *general* requirements do *not* give rise to a defense precluding enforcement of the "utterly central" filed rate doctrine. *Reiter*, 113 S.Ct. at 1219 ("defenses which may be used in an attempt to avoid payment of the filed rate are those "specifically

accorded by the [Act] itself" and do not include defenses "derived from . . . general [Act] requirement[s]"). Thus, while § 10743(b)(1) *generally* authorizes the ICC to adopt credit regulations, it does not "specifically accord[]" the ICC the power to promulgate a regulation enjoining collection of the filed rate as a remedy for a carrier's violation of those regulations. In fact, § 10743 cannot be reasonably read to condone any deviations from the filed rate. As noted by the ICC the term "payment" as used in § 10743 means paying the "full filed rate." Pet. at 4. Section 10743(b)(1) allows the carrier to give up possession of the freight before "[full] payment" is made, pursuant to ICC regulations. *Id.* Section 10743(b)(1) does not however provide that the ICC may prevent, by regulation, a carrier from ultimately collecting "full" payment, i.e., its filed rate.

Section 11702(a)(4) is also a *general* statutory authorization which provides the ICC with general power to "enforce" its regulations.[10] In sum, §§ 10743(b)(1) and

[10] The use in Section 11702(a)(4) of the term "enforce" cannot be read as tacitly vesting in the ICC an implied power to "disentitle" a carrier from collecting its filed rate. Indeed, no provision of the Act accords the ICC that power. The following hypothetical illustrates this point further. If a carrier violated a tariff regulation (adopted pursuant to 49 U.S.C. § 10762) by negotiating and billing a rate other than its duly filed and published rate, in violation of § 10762, the ICC could bring an enforcement action under § 11702 to obtain a cease and desist order preventing the carrier from charging the unfiled rate. The ICC could not, however, bring an action to "disentitle" the carrier from collecting the filed rate as a remedy for that violation without running afoul of the filed rate doctrine and the teachings of this Court in *Maislin*.

11702(a) are the analogs of § 10701(a), which contains the Act's general requirement that rates be "reasonable." Just as in *Reiter* this Court held that § 10701(a) does not give rise to a defense to the payment of a carrier's filed rate, the general pronouncements of §§ 10743(b) and 11702(a) do not confer upon the ICC the right to prevent the Trustee's collection of the filed rate as a remedy for Transcon's violation of the post-shipment billing requirements contained in the ICC's regulation.

Second, the ICC may not use its power under one part of the Act to undermine the Act's "utterly central" filed rate provisions. *Maislin*, 497 U.S. at 132. "By sanctioning an adherence to unfiled rates, the ICC rule 'undermines the basic structure of the Act.' " *Maislin*, 497 U.S. at 132. It made no difference that the *Negotiated Rates* policy was a purported statutory *remedy* "to comply with § 10762's directive to file the negotiated rate with the ICC." *Maislin*, 497 U.S. at 131. The ICC's argument here – that its attempt to prevent collection of the filed rate is justified by its statutory power to adopt credit regulations and enforce the Act – is the same argument rejected in *Maislin*. Moreover, the argument conflicts with the long-standing rule, reiterated in *Reiter*, that "tariff rates not disapproved by the ICC are legal rates, binding on both the shipper and the carrier." *Id.*, 113 S.Ct. at 1221 (citations omitted). As noted previously, the ICC's counsel conceded that Transcon's rates were never disapproved by the ICC and that the loss-of-discount provision is part of Transcon's filed rate. *See* pp. 15-16, *supra*.

Third, the ICC presumptuously claims the proper course to follow is for this Court to summarily reverse

the court of appeals judgment in light of *Reiter* and *Commercial Metals*. Pet. at 10 and 19. However, these cases, even if read capaciously, provide no support for the ICC's view that it may enjoin the operation of a duly filed, legal tariff.

Reiter addresses only a shipper's right to assert by way of a recoupment counterclaim the reparations right "specifically accorded" to it by the Act. *See* pp. 7-8 *supra*. All shippers who receive undercharge claims based on Transcon's loss-of-discount provision will still have that same right and there is nothing in the court of appeals' decision which implies the contrary.

Commercial Metals denies a shipper the right to utilize a violation of the ICC's credit regulations as a defense to the carrier's collection of a filed rate. There is nothing within *Commercial Metals* which would allow the ICC to act as the shipper's surrogate and provide it with that defense by way of an injunctive action. *See* pp. 12-15 *supra*. While *Commercial Metals* does state that the ICC, as opposed to the shipper, has the statutory power to enforce credit regulations, 456 U.S. at 349, *Commercial Metals* does *not* address the issue of whether the ICC has the statutory power to utilize its credit regulations to prevent the collection of a carrier's applicable filed-rate. This Court resolved that issue eight years later in *Maislin*. The ICC has no statutory authority to "exempt" motor common carriers from the requirement that they collect their published tariff rates. *Maislin*, 497 U.S. at 135-36.

Finally, the court of appeals correctly rejected the ICC's attempt to use its general authority to regulate

carriers' credit and enforce the Act as a device to circumvent the filed rate doctrine. The court of appeals recognized that the ICC had a "wide array of tools" to enforce its credit regulations and that the "*only* thing the ICC cannot do upon a violation of credit regulations is enjoin a carrier from suing a shipper for the filed rate." Pet. App. 7a (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should deny the ICC's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Copy of Excerpt of Unofficial Transcript of Oral Argument of *ICC v. Transcon* on April 8, 1992 Concerning: The Lawfulness of Transcon's Loss-of-Discount Tariff

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BY THE COURT:

Well as I understand it, I want to clarify something – as I understand it in 1988 the Commission adopted a regulation that expressly authorized loss of discount provisions.

MR. RUSH [COUNSEL FOR ICC]:

As a measure of liquidated damages for the need to collect, yes Sir.

BY THE COURT:

And at that point the regulations did not include did they these detailed notice and rebilling requirements.

MR. RUSH:

From 1985 the regulations required that if you were going to impose any penalty that the exact amount and nature and how it came into being must be shown on your bill of lading so that much existed in 1988 because it was there from 1985. The other two provisions were adopted in 1989. The rebilling and the no aggregate batch assertion requirements.

BY THE COURT:

Alright. So the filed rate could not have violated those particular regulations – the latter regulations you were describing at the time of the filing.

MR. RUSH:

No because it was filed in 1987.

BY THE COURT:

Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading.

MR. RUSH:

No. We don't contend the tariff violated anything. We contend that the tariff was one of four things that had to be done in order to be released from the obligation to charge no more than the discounted rate.

* * *

Supreme Court, U.S.
FILED
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No. 93-1318

In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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TABLE OF AUTHORITIES

Cases:

	Page
ICC v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) ...	5
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	1, 2, 3
Rebel Motor Freight, Inc. v. *ICC*, 971 F.2d 1288 (6th Cir. 1992)	3
Reiter v. *Cooper*, 113 S. Ct. 1213 (1993)	3, 4, 7
Southern Pacific Transp. Co. v. *Commercial Metals Co.*, 456 U.S. 336 (1982)	3, 5, 7
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 (1959)	4

Statutes:

Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:	
49 U.S.C. 10701	1
49 U.S.C. 10743	4
49 U.S.C. 10743(a)	2
49 U.S.C. 11702(a)(5)	4

In the Supreme Court of the United States

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INTERSTATE COMMERCE COMMISSION, PETITIONER

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TRANSCON LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

Respondents' basic submission in this case is that Transcon's trustee in bankruptcy has an inviolate right to enforce a credit provision in Transcon's tariff, even though the collection action violates numerous provisions of the ICC's credit regulations. In support of that claim, respondents rely principally on this Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). See Br. in Opp. 10, 11-12, 20, 21. *Maislin*, however, has no applicability to this case.

Maislin involved an exercise by the ICC of its general powers under 49 U.S.C. 10701 to require a carrier's practices to be reasonable. The ICC had determined that it was an "unreasonable practice" for a carrier to collect its filed tariff rate, after it negotiated (but had failed to

file) lower rates on which a shipper reasonably relied. 497 U.S. at 121-122, 129-130. This Court held that the ICC could not find it to be an unreasonable practice for a carrier to collect the filed rate, because the statute itself requires the carrier to take that action. *Id.* at 130-131. Thus, *Maislin* rests on a holding that the carrier had not committed any statutory or regulatory violation at all in seeking to collect its rates.

In contrast, respondents here concede that they "did not comply" with the ICC's duly authorized credit regulations, which govern how and when a carrier may assess charges in addition to the freight charges that are due on delivery. Br. in Opp. 4-5. And, unlike the bankrupt carriers in *Maislin* (who directly challenged the ICC's regulatory policy), respondents do not contend that the ICC's regulations are invalid. Rather, respondents claim immunity from an injunction in this case by elevating the filed rate doctrine above all other requirements in the Act—including the Act's express prohibition of shipments on credit except as authorized by ICC regulations. 49 U.S.C. 10743(a). Respondents simply insist that because the filed rate doctrine prevailed in *Maislin* it must prevail here as well. Br. in Opp. 11. The issue presented here, however, is significantly different from the issue in *Maislin*. The issue here is whether the ICC can obtain a federal court injunction that prohibits a motor carrier and its trustee in bankruptcy from collecting charges sought *in admitted violation of the Commission's credit regulations*. *Maislin* does not address the issue of how the competing demands of the filed rate doctrine and other requirements of the Act are to be reconciled in any particular setting, because no violation of the Act was found in that case.[1]

Since *Maislin*, the Court has specifically addressed the interaction between the filed rate doctrine and other statutory claims and defenses. See *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993). *Reiter* holds that the filed rate doctrine is no obstacle to the assertion of "claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." *Id.* at 1219. Respondents seek (Br. in Opp. 12) to distinguish *Reiter* by noting that in *Reiter* the claim "accorded by the Act" was asserted by a shipper, and in this case the claim "accorded by the Act" is asserted by the ICC. Respondents further argue (Br. in Opp. 12) that *Reiter* is irrelevant here because, under *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982), *shippers* have no right to defend

[1] Contrary to respondents' contentions, *Maislin* is inapplicable here for two other independent reasons. First, the additional charges respondents seek to impose are not a "filed rate" at all for purposes of the filed rate doctrine. Br. in Opp. 16. The only rate protected by the filed rate doctrine is the *rate due on delivery*. The additional charges sought by respondents are *defined* by reference to tariff rates (as the ICC acknowledged below), but they are nothing more than a charge for extending credit. See Pet. 16. *Maislin* has nothing to say about protecting credit terms (let alone liquidated damages claims as are made here). Second, even on the assumption that respondents' credit charges *are* a filed rate, the ICC's injunction does not require a departure from the tariff schedule entirely. The basic point of *Maislin* is that *negotiated, unfiled* rates may not be enforced at the expense of the filed rate. Here, the ICC's injunction would not limit respondents to collection of a negotiated, unfiled rate. Rather, under the ICC's injunction respondents could collect the full filed rate due upon delivery, plus interest. *Maislin* does not prelude a remedy that compels a carrier to observe one filed rate rather than another. See *Maislin*, 497 U.S. at 129 n.11; *Rebel Motor Freight, Inc.* v. *ICC*, 971 F.2d 1288, 1294 (6th Cir. 1992).

against the collection of the filed rate by invoking a violation of the credit regulations.

Respondents' effort to distinguish *Reiter* is unpersuasive. The central principle of *Reiter* is that the filed rate doctrine does not trump other statutory rights expressly conferred by the Interstate Commerce Act itself. That principle cannot logically be limited to private rights conferred upon shippers. It would be ironic indeed if the right vested in the ICC to enforce the requirements of the Act were deemed of lesser consequence than the right of shippers to avoid payment of unreasonable rates. If respondents were correct, carriers would be free to insert flagrantly unreasonable or discriminatory terms in their tariffs, and the ICC would have no ability to prevent application of those tariffs by "bring[ing] a civil action * * * to enforce [the Interstate Commerce Act] * * * or a regulation or order of the Commission * * * when violated by a [motor] carrier providing transportation subject to the jurisdiction of the Commission." 49 U.S.C. 11702(a)(5). *Reiter* makes clear that the Act is not to be frustrated by according primacy in each and every case to the filed rate doctrine.[2]

[2] Respondents suggest (Br. in Opp. 18-19) that both the ICC's power to issue credit regulations and its power to seek injunctions are "*general* requirements" of the Act that do not trump the filed rate doctrine under *Reiter*. In *Reiter*, the Court accepted that the Act's general reasonable-rate requirement does not provide a defense to a collection action based on the filed tariff, because the Court had so held in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959). 113 S. Ct. at 1219. But the statutory credit provision is not a "general" requirement in that sense; it is a specific prohibition against release of goods by carriers without payment, unless the ICC specifically authorizes otherwise. 49 U.S.C. 10743. And the ICC's power to request an injunction is not a "requirement" of the Act at all; it is a tool for enforcing it. For purposes of the issue here, the two provisions in tandem are fully analogous to the reparations right at issue in *Reiter*.

This Court has recognized that the Commission may prevent a carrier from collecting rates that facially comply with the tariff filing requirements of the Act because the rates violate other regulatory requirements. See *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) (upholding retroactive rejection of a tariff).

Nor are respondents assisted by noting that *Commercial Metals* gives no right to shippers to enforce the credit regulations as against the filed rate. That decision explicitly recognizes that *the ICC* has "the power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations." *Commercial Metals*, 456 U.S. at 349. Indeed, it was largely because "the ICC may regulate the credit practices of carriers even without the judicially created remedy of forfeiture of freight charges," *id.* at 350, that the Court declined to find an implied remedy in favor of shippers. While respondents would have the ICC rely on virtually any remedy other than an injunction to enforce its credit regulations against carriers that violate them, Br. in Opp. 14 & n.6, this Court concluded in *Commercial Metals* that "[t]he remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." 456 U.S. at 352. Respondents' argument—that they must be permitted to collect rates even though they may be subjected to civil or criminal penalties for doing so in violation of the credit regulations—has no basis in the Act or in common sense.

Respondents also suggest (Br. in Opp. 13) that *Commercial Metals*'s endorsement of the ICC's power to seek an injunction is inapplicable here, because the ICC is seeking to enforce its regulations "retroactively by

preventing the Trustee from collecting filed rate charges," and "[i]t is axiomatic that one cannot use injunctive powers to prevent conduct that has already occurred." The ICC is not seeking an injunction to prevent violations that have already occurred. Rather, the ICC is seeking to prevent the Trustee from enforcing credit terms in a manner that clearly violates the ICC's credit regulations. There is nothing "retroactive" about preventing those violations from occurring.

Respondents are seeking to enforce defective bills for additional charges that were not sent to shippers on time, and of which shippers were never given adequate notice. Br. in Opp. 4. They are also seeking to collect on aggregate freight bills, rather than individual ones, *id.* at 4-5, when the economies of scale realized by that procedure negate the purpose of allowing credit-collection charges in the first place. Pet. 16 n.10. The collection of the additional credit charges in direct violation of the ICC's regulations constitutes an ongoing violation of governing requirements, and the requested injunction would restrain precisely that conduct. It would not, however, preclude respondents from collecting the tariff charges due and assessed at the time of shipment, plus interest for any payments that were not timely made.

In the end, respondents' contentions are irreconcilable with the principles of *Commercial Metals* and *Reiter*. We submit that, as a direct application of those precedents, this Court can and should summarily hold that the ICC is empowered to seek a federal court injunction to enforce its credit regulations, notwithstanding the filed rate doctrine. But if *Maislin* casts any doubt on that proposition, this Court's plenary review is warranted to clarify the scope of the ICC's enforcement powers in this context.

* * * * *

For the foregoing reasons, as well as those stated in our petition, the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed on the authority of *Reiter v. Cooper*, *supra*, and *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, *supra*. Alternatively, the Court should grant the petition and set this case for argument.

Respectfully submitted.

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INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

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10 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED 4

REASONS WHY WRIT SHOULD BE DENIED 5

1. The Ninth Circuit Decision Dismissing The Injunction Is In Accordance With *Reiter v. Cooper* 5

2. The Ninth Circuit's Decision Is Consistent With *Commercial Metals* 8

3. The Ninth Circuit's Decision Upholds The Filed Rate Doctrine and Prevents Discrimination Amongst Shippers 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Consolidated Rail Corp. v. Containair Systems Corp., 553 F. Supp. 418 (S.D.N.Y. 1981) 9

Maislin Industries, U.S. v. Primary Steel, Inc., 497 U.S. 116 (1990) 7, 9, 11

Reiter v. Cooper, 113 S.Ct. 1213 (1993) ..... *passim*

Southern Pacific Transportation Co. v. Commercial Metals, 456 U.S. 336 (1982) 7, 8, 9, 10, 11

STATUTES

49 U.S.C. § 10701(a) 6

49 U.S.C. § 10741(b) 12

49 U.S.C. § 10761(a) 2, 7

49 U.S.C. § 10762(a)(1) 2, 7

49 U.S.C. § 11705(b)(3) 6

REGULATIONS

49 C.F.R. § 1320.2(g)(2)(iii) 2

49 C.F.R. § 1320.2(g)(2)(vi) 2

49 C.F.R. § 1320.2(h) 12

49 C.F.R. § 1320.3(c) 2

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

Amicus Curiae, the International Brotherhood of Teamsters ("IBT"), hereby requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit sought by Petitioner, Interstate Commerce Commission ("ICC" or "Commission"), be denied.

STATEMENT AND INTEREST OF AMICUS CURIAE

This case involves misguided efforts by the ICC to prevent Transcon Lines' ("Transcon") trustee in bankruptcy from recovering freight charges owed by shippers

who failed to pay filed tariff rates as required by the Interstate Commerce Act.[1] Transcon's duly published tariff provided shippers a discounted rate if they paid freight charges within 90 days of shipment. Failure to pay within the 90 days resulted in the application of otherwise published non-discount rates. There is no dispute regarding the clarity of this "loss of discount" provision, nor is there any question as to it being properly filed with the ICC.

After Transcon went into bankruptcy, an audit of its records showed that, notwithstanding the tariff's unambiguous terms, many shippers had paid (or were seeking to pay) discount rates long after the 90-day period had elapsed.[2] On behalf of creditors of the estate, the trustee has attempted to recover the applicable undercharges from the shippers, *i.e.*, the difference between the discount and non-discount rates. The ICC has sought to enjoin the trustee from collecting these undercharges on the basis that Transcon failed to comply with the Commission's credit regulations.[3]

---

[1] The duty of a carrier to collect and a shipper to pay filed tariff rates, sometimes referred to as the "filed rate doctrine", is a clear requirement of the Interstate Commerce Act. 49 U.S.C. §§ 10761(a) and 10762(a)(1).

[2] It is our understanding that some shippers have not paid any freight charges for services they received years ago and on the basis of the ICC's position contend to this very day that they are entitled to discounted rates.

[3] The ICC has alleged that Transcon's original bills did not advise shippers of the consequences of late payment, in violation of 49 C.F.R. 1320.3(c); revised bills were not issued until after the 90-day period provided for in 49 C.F.R. 1320.2(g)(2)(vi); and the trustee sought to apply the loss-of-discount provision on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii).

This case has been before this Court once before at which time it granted certiorari and remanded for further consideration in light of its recent decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). See *ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993). On remand the court of appeals concluded that its earlier decision was in complete accordance with this Court's holding in *Reiter*. Pet. at 4a.[4]

It is time to bring this seemingly endless litigation to a conclusion and allow the trustee to collect monies owed by delinquent shippers so that creditors finally can be paid at least part of the amounts due them. Former and current members of the IBT who had been employed by Transcon are the largest creditors of the Transcon estate. They are owed more than $23 million in back wages, severance pay, etc.[5] In addition, a claim for almost $16 million was filed by the Central States, Southeast and Southwest Areas Pension Fund, which is the pension fund covering IBT members employed by Transcon.[6] The undercharge claims brought by Transcon's trustee are the estate's major, if not only, asset and the collection of these claims represents the only hope which these former employees have of recovering any portion of the monies

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[4] Citations to the ICC's Petition and Appendices are referred to as "Pet. at ___."

[5] A copy of the proof of claim filed on behalf of Transcon's former employees was attached as Appendix A to the IBT's brief in support of the Respondents in this case, 92-1547 Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 1a-6a.

[6] See Appendix B to IBT's brief in support of the Respondents in this case, 92-1547 Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 7a-9a.

they are owed. For that reason and because a reversal of the Ninth Circuit's decision is unwarranted and would significantly erode the filed rate doctrine which is of critical importance to the well being of hundreds of other motor carriers and the thousands of people they employ, many of whom are IBT members, this brief is being filed in support of the Respondents and in opposition to the petition for a writ of certiorari (hereafter "Petition") filed by the ICC.

SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED

On remand, the Ninth Circuit correctly held that its earlier decision, in which it found that a failure to comply with certain technical ICC credit regulations did not prevent the trustee from collecting Transcon's filed tariff rate, is consistent with this Court's decision in *Reiter v. Cooper, supra*.

If the ICC's position is upheld and Transcon's loss of discount provisions are voided, all shippers that transported cargo with Transcon would receive the discounted rate regardless of whether they had paid their freight charges within the required 90 days. As a result, those shippers who had paid their freight charges within 90 days would be prejudiced vis a vis those shippers who chose to ignore the 90-day requirement. Adopting the ICC's position would in fact sanction the type of discriminatory conduct that the Commission's credit regulations expressly prohibit.

In addition, prohibiting the trustee from collecting filed tariff rates from late paying shippers will severely

prejudice Transcon's former employees. These shippers helped to force Transcon into bankruptcy by refusing to pay discounted rates within the time prescribed. Now, if they are permitted to avoid paying the higher rates provided for in Transcon's tariff for late payment, i.e., the non-discounted rates, these same shippers will deprive Transcon's former employees of wages, severance pay and pension contributions owed to them. This Court should not sanction such a result; it would not be fair or equitable.

REASONS WHY WRIT SHOULD BE DENIED

1. The Ninth Circuit Decision Dismissing The Injunction Is In Accordance With *Reiter v. Cooper*

The ICC requests in its Petition that " . . . the judgment of the court of appeals [should be] summarily reversed on the authority of *Reiter v. Cooper*. . . . " Pet. at 19. The ICC's contention that the court of appeals' decision is inconsistent with *Reiter* is unfounded. Indeed the Ninth Circuit's decision is mandated by and entirely consistent with *Reiter*.

In *Reiter*, this Court reaffirmed the validity and need for strict enforcement of the filed rate doctrine. *Reiter v. Cooper*, 113 S.Ct. 1213. While the *Reiter* Court went on to hold that *shippers* may avoid the filed rate by asserting claims and defenses accorded by the Act, nowhere in *Reiter* does the Court grant the ICC authority to seek to enjoin collection of the filed tariff rates by a bankruptcy trustee.

The filed rate doctrine embodies the principle that a *shipper* cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. * * * It assuredly does *not* preclude avoidance of the tariff rate, however, through *claims* and *defenses* that are specifically accorded by the ICA itself. We can agree with respondents that this latter category does not include any 'unreasonable-rate defense,' derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be 'reasonable.' * * * But we cannot agree that the filed rate doctrine precludes *shippers* from asserting (by way of *claim* or *counterclaim*) the reparations rights explicitly conferred by § 11705(b)(3).

Reiter v. Cooper, 113 S.Ct. 1213, 1219 (emphasis added; citations omitted). The ICC acknowledges that the Court granted shippers the right to raise defenses and counterclaims but it then contends without any support that: "The ICC's right to bring an injunction action in this case directly follows from the principle established in *Reiter*." Pet. at 11. This illogical leap of faith from the "principle" in *Reiter* is noticeable for its lack of authority. As the court of appeals concluded below:

> The ICC's argument is unwarranted by a plain reading of *Reiter*. By its clear language, *Reiter* did no more than address claims or defenses that the ICA specifically accorded to *shippers*. Unequivocal Supreme Court precedent holds, however, that the ICA does not confer on shippers the right to raise any claims or defense arising from a carrier's violation of ICC credit

> regulations. As such, the holding in *Reiter* does not directly apply to the facts of this case.

Pet. at 4a.

In order to avoid the plain meaning of *Reiter*, the ICC insists that *Reiter* should be read liberally to allow the ICC, in addition to a shipper, to assert claims and defenses accorded by the ICA. Pet. at 10-14. In doing so, however, the ICC would have this Court ignore the fact that the failure to adhere to ICC credit regulations does not give rise to a *claim* or *defense* cognizable under the Interstate Commerce Act to an action for undercharges by a trustee. The filed rate doctrine, *i.e.*, the duty of the carrier to collect and the shipper to pay filed tariff rates (see 49 U.S.C. §§ 10761(a) and 10762(a)(1), and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)) is not modified or excused because of a carrier's failure to comply with credit regulations. This was the holding in *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). In *Commercial Metals*, the Court specifically concluded that,

> . . . the carrier's . . . violation of the credit regulations are insufficient . . . to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) will estop or preclude it [the carrier] from enforcing payment of the full amount by a person liable therefor.

Id. at 352 (citations omitted). Since a shipper cannot avoid the enforcement of the filed rate by asserting violations of the ICC's credit regulations, there is no basis under *Reiter v. Cooper* for finding that the ICC may do so.

Even if *Reiter* were construed as enabling the ICC to assert the same claims and defenses as a shipper to an undercharge action, it clearly does not give the ICC additional defenses which are not available to shippers.

Accordingly, the ICC's argument that *Reiter v. Cooper* is in conflict with the court of appeals' decision is unfounded. Rather the court of appeals' decision is consistent with and indeed mandated by *Reiter v. Cooper* and *Commercial Metals*.

2. The Ninth Circuit's Decision Is Consistent With *Commercial Metals*

The court of appeals, consistent with *Commercial Metals*, recognized that the ICC has general authority to enforce its credit regulations by seeking an injunction and that the ICC has broad powers to shape remedies for the violation of its rules. Pet. at 31a. Thus, for example, the ICC could prohibit carriers from extending credit when they have previously done so in violation of ICC regulations or it could reject tariff credit provisions which fail to comply with regulations. However, as noted above, both this Court in *Commercial Metals* and the court of appeals in its initial decision, concluded that a violation of the credit regulations does not preclude collection of the filed rate:

> [N]either the statute under which the regulations were promulgated, 49 U.S.C. § 3(2), nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it [the carrier] from collecting the lawful freight charge.

Southern Pacific Transp. Co. v. Commercial Metals, Co., 456 U.S. 344-345.

> The case, however, is different when the ICC seeks an injunction applying its regulations in such a way as to undercut the filed [rate] requirement. Then *Maislin* governs. Regulations, however valid in other contexts, cannot furnish the reasons for letting the carrier abandon the filed rate.

Pet. at 32a.[7]

The ICC's contention that its inability to enjoin the trustee from collecting the filed rate "vitiates" its power to enforce its regulations is a gross exaggeration. As the court of appeals concluded in its opinion on remand, the ICC can invoke all other enforcement mechanisms to enforce its credit regulations.

> The only thing that the ICC cannot do upon a violation of credit regulations is enjoin the carrier from suing the shipper for the filed rate. Since all other enforcement mechanisms remain, the claim that our opinion in Transcon eviscerates the ICC's power to enforce its credit regulations is overblown.

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[7] See also *Consolidated Rail Corp. v. Containair Systems Corp.*, 553 F. Supp. 418, 421 (S.D.N.Y. 1981) holding that credit regulations " . . . implement the Congressional purpose of preventing rate discrimination in the form of differential credit arrangements" and "provide no basis for imposing the extraordinary relief of excusing compliance with applicable tariffs." It is also noteworthy that the credit regulations relied upon by the ICC do not provide an affirmative defense to undercharge claims. See *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. at 345.

Pet. at 7a. Accordingly, notwithstanding the ICC's contention to the contrary, the court of appeals' decision was entirely consistent with *Commercial Metals*.

3. The Ninth Circuit's Decision Upholds The Filed Rate Doctrine and Prevents Discrimination Amongst Shippers

The ICC also argues that its efforts to enjoin the collection of the non-discounted rate would not completely undermine the filed rate doctrine, because the trustee would still be able to collect the discounted rate and interest charges. Pet. at 15-16. The ICC further contends that the non-discounted rate is merely a liquidated damage provision for failure to meet the credit terms and is not the filed rate at all and thus the failure to apply the non-discounted rate will not "interfere" with the filed rate doctrine. Pet. at 16. This characterization makes a mockery of the filed rate doctrine and seeks to circumvent the jurisprudence of this court by denigrating the applicable tariff rate to a mere technical damage provision. Such a position not only ignores the plain language of the tariff in this case, but also threatens the very foundation of the filed rate doctrine.[8]

---

[8] Transcon's tariff provided in pertinent part:

1. [D]iscounts *** shall apply when tariff charges are paid within 90 calendar days from date of shipment.
2. * * * This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

As the Court has repeatedly held, the filed rate doctrine is "utterly central" to the administration of the Interstate Commerce Act and without it, it would be "monumentally difficult to enforce" the statute's nondiscriminatory and reasonableness requirements. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. at 2769; *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. at 343-344. Here, the ICC is seeking to enjoin the collection of the applicable rate by making a meaningless characterization. The fact is, no matter what the non-discounted tariff rate is called, Transcon's tariff specifically provided that if the shipper did not pay within 90 days of shipment it would be required to pay the non-discounted tariff rate. This was unambiguously set out in Transcon's tariff and was recognized by both the carrier and shippers alike.

Refusing to enforce Transcon's loss of discount provisions – the filed rate – would not only be contrary to the filed rate doctrine, but it would also run afoul of the well-established principle that enforcement of tariff terms is required to prevent discrimination between shippers.

> This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act – to achieve uniformity in freight transportation charges, and thereby to eliminate . . . discrimination and favoritism . . . .

Southern Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. at 344. See also, *Maislin*, 110 S. Ct. at 2766. Here, if the Commission's arguments prevail and Transcon's loss of discount provisions are voided, discrimination would occur because all shippers utilizing Transcon's services would receive the discounted rates, regardless of when

the freight charges were paid. Shippers who paid in more than 90 days would, in effect, be given preferential treatment by being granted the same terms as shippers who paid in less than 90 days. This is exactly what the Transcon tariff and the ICC's credit regulations were intended to prevent. Indeed the ICC's regulations pertaining to loss of discount provisions specifically provide that:

> Tariff rules published pursuant to paragraphs (a), (c) and (j) of this section shall not result in unreasonable discrimination among shippers.

49 C.F.R. § 1320.2(h). See also, *Consolidated Rail Corp. v. Containair Systems Corp.*, 553 F. Supp. at 420 ("By enforcing tariffs with unwavering diligence, the courts have assured that rate discrimination cannot be conducted in subtle forms."); 49 U.S.C. § 10741(b) ("A common carrier . . . may not subject a person . . . to unreasonable discrimination"). Notwithstanding this clear statutory pronouncement, the ICC now chooses to ignore the discriminatory consequences of its arguments and thereby unduly prefer late-paying shippers.

Perhaps to justify the discriminatory consequences of its position, the ICC has attempted to paint the trustee and its collection agents as the "villain" and the shippers as "unsuspecting" victims. The reality of this case is far different as the court of appeals recognized:

> The equities here are not necessarily with the late-paying shippers. They enjoyed an extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors.

Pet. at 33a-34a. These shippers intentionally and willfully declined to pay discounted freight charges within the published 90-day period. They took undue and improper advantage of Transcon's extension of credit. As a result, Transcon's cash flow was severely jeopardized and it was forced into bankruptcy. Numerous people lost their jobs and are owed substantial sums of money. As a matter of law and as a matter of equity, these shippers ought not be relieved of their obligation to pay the non-discounted rates published in Transcon's tariffs which are applicable to shippers who fail to pay freight charges in the time allotted.

CONCLUSION

For the foregoing reasons a writ of certiorari should be denied.

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No. 93-1318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION OF INTERSTATE COMMERCE COMMISSION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT — REASONS FOR GRANTING THE WRIT	5
I. This Case Raises Issues of Extraordinary Importance	5
II. The Decision Below Is Contrary to Decisions of This Court	7
III. The Decision Has Created A Conflict with Decisions Upholding the ICC's Rules in Other Circuits	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	Page(s)
ADM of Mississippi, Inc., 1990 Fed Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.)	14
Delta Traffic Service, Inc. v. ADM of Mississippi, Inc., No. 91-1098 (5th Cir. 1992)	14
Delta Traffic Service, Inc. v. Mennen Co., 730 F.Supp. 1309 (D.N.J.), *aff'd* 919 F.2d 134 (3d Cir. 1990)	14
Delta Traffic Service, Inc. v. Purdue Frederick Co., 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D.Conn. 1989)	14
Fidelcor Business Credit Corp. v. Dillard Department Stores, Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,753 (M.D.Fla. 1992)	15
ICC v. Transcon Lines, 113 S.Ct. 2955 (1993)	2
Lifschultz Fast Freight, Inc. v. National Manufacturing Co., 804 F.Supp. 1059 (N.D. Ill. 1992)	15
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	*passim*
Olson Distributing Systems, Inc. v. Glasurit America, Inc., 850 F.2d 295 (6th Cir. 1988)	12
Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment, 4 I.C.C.2d 340 (1988)	13
Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment, 5 I.C.C.2d 691 (1989)	2
Reiter v. Cooper, 113 S.Ct. 1213 (1993)	*passim*

Rocky Mountain Motor Tariff Bureau, Inc. v. ICC, 590 F.2d 865 (10th Cir. 1979)	12
Security Services, Inc. v. K Mart Corp., 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 114 S.Ct. 341 (1993)	10
Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982)	11, 12, 13
STATUTES AND REGULATIONS	
49 U.S.C. § 10743	6
49 C.F.R. Part 1320	*passim*

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Small Shipments Traffic Conference, Inc., includes among its more than 450 members, individuals, small companies and major corporations. *Amicus* Health and Personal Care Distribution Conference, Inc. includes among its 70 members most major manufacturers of drugs, medicines and toiletries, as well as many smaller companies. Both *amici* (hereinafter "Shipper Conferences") are nonprofit membership corporations whose principal activities involve pursuing the

[1] All parties to this case have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk of the Court.

interests of their members in their capacities as shippers of freight, primarily via motor carriers subject to the provisions of the Interstate Commerce Act (ICA) and regulations of the Interstate Commerce Commission (ICC) issued pursuant to that Act. Many members were customers of Transcon Lines prior to its bankruptcy.

The deluge of undercharge cases which has accompanied the bankruptcies of numerous motor carriers in recent years is well known to this Court. Shipper Conferences have been required to devote a major proportion of their resources to proceedings before the ICC and in the courts concerning undercharge claims against shippers. Shipper Conferences participated as *amici curiae* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and in *Reiter v. Cooper*, ___ U.S. ___, 113 S.Ct. 1213 (1993). In addition, the Conferences participated as *amici* in this case on two occasions before the Ninth Circuit, the undersigned participated in the oral argument before that court, and the Conferences filed a brief as *amici* in support of the ICC's prior petition for a writ of certiorari in *ICC v. Transcon Lines*, which this Court granted. 113 S.Ct. 2955 (1993).

Shipper Conferences were also the leading shipper parties in the ICC proceedings during the period 1986-1989 that led to adoption of the credit regulations at issue here. 49 C.F.R. Part 1320. Indeed, the provisions of the present regulations were specifically adopted by the ICC in order to *prevent* the result allowed under the decision below. These regulations were adopted at the request of these Shipper Conferences and with the joint sponsorship of the trucking industry, acting through the American Trucking Association. See *Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment*, 5 I.C.C. 2d 691 (1989).

Many members of the Shipper Conferences have been made defendants against undercharge claims by bankrupt truck-

ing companies based on the theory that loss of discount penalties for late payments can be imposed several years after the bills were paid and in clear violation of the ICC's credit regulations.

The Shipper Conferences support the ICC's petition for a writ of certiorari. The purpose of this brief is to supplement the arguments of the ICC with a discussion, from the shipper community's perspective, of the need for review of the Ninth Circuit's decision by the Supreme Court, and for reversal.

SUMMARY OF ARGUMENT

The ICC's Petition concerns claims for undercharges which Transcon filed against numerous shippers based on tariff provisions imposing a severe penalty for late payment of freight charges. Although ICC rules required that notice of a prospective late payment penalty be given with the freight bill, no notices were given by Transcon and its late payment claims were entirely unexpected by the shipper. Based upon a late payment provision in its tariff, Transcon seeks to collect the difference between the discounted tariff rates originally billed and paid and the full undiscounted tariff rates which are collectively set by carriers in groups in order to serve as base rates from which actual discount rates are derived. The penalty rates sought are about double the rates originally billed and paid.

The ICC's credit regulations provide important safeguards to preclude a carrier from accumulating large sums of late payment penalties by not informing shippers of their potential liability and not promptly claiming the penalty, so that the shipper could avoid recurrences of late payments. The public protections built into the regulations include: a plain notice on any original freight bills subject to prospective penalty that the discount would be forfeited if not paid by a certain date; a requirement that the carrier rebill at the higher rate within 90 days; and a provision precluding accumulation of penalty charges for a series of bills for presentation in bulk. It is

undisputed that the regulations are intended to preclude precisely what Transcon is doing here.

Transcon's collection efforts were found to violate these ICC credit regulations. But the Ninth Circuit went on to hold that the ICC could not obtain an injunction against Transcon's violations of ICC regulations because Transcon's filed tariff assertedly trumps those regulations. In so holding, the Ninth Circuit left the ICC, and thousands of shipper defendants, with no effective remedy against claims which violate the regulations on their face.

Moreover, because of its breadth, the court's holding has the effect of undermining all ICC regulations, and the public's ability to rely on those regulations is now uncertain. Because it elevates any filed tariff to a position of supremacy over the ICC's regulations, this ruling, if not reversed, will have devastating effects. Simply stated, the Ninth Circuit boldly asserts that a carrier is free to override any ICC regulation by so providing in its tariff. Misreading the scope of this Court's opinion in *Maislin*, the Ninth Circuit would tolerate a form of anarchy whereby the regulated, through tariffs they publish unilaterally, are free to trump the regulator. Ironically, Transcon's tariff item creating the rate penalty specifically provides that the *shippers* must comply with the ICC's credit regulations. Transcon would bind the shippers to rules which it claims have no efficacy as to itself.

The decision below conflicts with rulings by other federal courts, including the Third and Fifth Circuit. As matters stand, the ICC's credit regulations are in effect in the Third and the Fifth Circuit, but not in the Ninth Circuit. Since the carrier brings the action and selects the forum, by adroit forum-shopping a carrier can flout the Commission's rules as to most shippers. The relationship between carrier tariffs and ICC regulations should be uniform nationwide.

The court of appeals has also misread decisions of this Court dealing with ICC jurisdiction, the filed rate doctrine, and statutory powers invested in the ICC to control carrier credit practices. Under those decisions, the ICC is not powerless to remedy carrier violations of its regulations, merely because the carrier attempts to supervene the regulations by crafting a tariff provision which purports to nullify them.

ARGUMENT — REASONS FOR GRANTING THE WRIT

I. This Case Raises Issues of Extraordinary Importance

In its ruling on the ICC's prior petition for a writ of certiorari, this Court summarily vacated the previous decision by the Ninth Circuit and remanded this case for further consideration in light of *Reiter v. Cooper*. Both *Reiter* and *Maislin* concerned undercharges based on the bankrupt carrier's attempt to substitute tariff rates for the unfiled rates the carrier originally quoted and billed and the shipper paid. In both cases, this Court recognized the role of the ICC in assessing the reasonableness of the tariff rates on which the undercharges were based. This case involves undercharge claims giving rise to a dispute over which of two sets of filed rates — discounted tariff rates, or the higher undiscounted tariff penalty rates — should apply.

In the decision below, the Ninth Circuit rejected any role for the ICC in resolving the dispute, even though the ICC has clear statutory authority over tariffs and credit practices. The ICC had conducted a rulemaking and promulgated regulations. It was before the court of appeals under its statutory enforcement authority seeking to enjoin Transcon's violations of regulations which the statute required it to make. The court below reached its result because of its belief, based on its misreading of *Maislin* and *Reiter*, that the filed rate doctrine makes tariff provisions controlling even where the carrier violated ICC regulations.

The Ninth Circuit's holding, that by a tariff provision a carrier can "trump" the agency's regulations and accomplish a result the regulations were designed to prevent, extends beyond this case and pervasively into the law governing administrative agencies in general. The mere thought that a regulated company can defeat an agency's regulations by a tariff provision is chilling.

The adverse impacts of the decision below on Transcon's former shippers are compounded by the expansive nature of the Ninth Circuit's reasoning. It is difficult to think of a more egregious violation of ICC regulations. And yet Transcon, based on the Ninth Circuit's misreading of *Maislin*, stands to collect millions of dollars from shippers who paid the tariff rates which they were originally billed.

The Interstate Commerce Act *prohibits* the extension of credit *except under regulations of the Commission*, 49 U.S.C. § 10743. Compliance with the regulations is thus a prerequisite, mandated by Congress, for *any* extension of credit. The specific regulations that Transcon violated were adopted for the express purpose of preventing credit provisions in carrier tariffs from becoming the trap for the unwary that Transcon has now sprung. Where the carrier notes its loss-of-discount penalties on its freight bills and rebills for the higher penalty amounts within 90 days after expiration of the authorized credit period, the shipper is put on notice of the penalty and of its failure to meet the specified payment date. If the shipper thus receives notice that it has paid a bill late, it can take corrective action and prevent the accumulation of a large penalty balance. The practical impact of the Ninth Circuit's decision is that a carrier can stand by and accumulate three years of bills before it goes bankrupt, without telling the shipper along the way that any payment arrived late.

Thus, this case does not involve a minor or inadvertent deviation from some technicality buried in the Code of Federal

Regulations. As to all its shippers, Transcon consistently ignored *all* the key requirements of the regulations governing imposition of the additional penalty charges it seeks to collect. Yet the Commission's credit regulations were the sole authorization under the statute for Transcon's credit-based billing practices. If such violations as these are permissible under the filed rate doctrine, *any* ICC regulation that implements the requirements of the Interstate Commerce Act is in jeopardy. What good is an agency's regulation if it can be rendered void by the carrier?

The extraordinary importance of this case warrants granting the ICC's Petition.

II. The Decision Below Is Contrary to Decisions of This Court

The Ninth Circuit's decision hinges upon its misreading of this Court's opinion in *Maislin* and a disregard of *Reiter*. Ultimately, rather than approaching the Interstate Commerce Act as a balanced system of regulation and harmonizing its various provisions, it viewed its task as:

> ... to decide which of two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions.
>
> In deciding which provision should be given priority, we take guidance from the Supreme Court's affirmation in *Maislin* of the vital importance of the filed rate doctrine to the ICA. (App. 5a to ICC Petition.)

And in the same vein:

> *Reiter* at most requires us to resolve a clash of two statutory claims. (App. 8a to ICC Petition.)

Certainly, the filed rate provision and the credit provision, including its directive that the ICC issue controlling credit

regulations, are both part of the same ICA, along with the requirement that carrier rates and practices be reasonable. But the Act was written by Congress to be enforced as a whole, with all its provisions given effect. All the rates to which the credit provision and the implementing ICC regulations apply are "filed rates", so Congress understood that it was not detracting from filed rates when it included credit provisions in the ICA. What the Ninth Circuit lost sight of is that both the rates initially charged by Transcon (all the thousands of discount rates in its rate tariff) as well as the undiscounted bureau rates in another tariff are likewise filed rates.

To say, as the court did, that the carrier retains veto power over the Commission's credit regulations to determine which of its filed rates will apply is to negate utterly the specific authority which Congress delegated to the ICC. If, as the court opines, a rule inserted by a carrier into its tariffs can preclude the operation of the ICC's regulations, then the carrier would be vested with the power to overrule the ICC in the discharge of a function specifically given it by statute. And, since all the rates to which the credit provision and regulations apply are filed rates, a carrier would hold a veto power over the ICC's credit rules as to all its rates, exercisable simply by a statement in its tariff that the rates apply independently of and whenever contrary to the ICC's rules. In effect, compliance with the ICC's rules would become optional on the part of the carrier and Congress' intent to regulate carriers' credit terms would be defeated.

The court erred not only by reading into the filed rate provision a carrier's power to veto the ICC's regulations but also in treating the credit regulation here as somehow substituting "secret" rates for filed rates and thereby transgressing *Maislin* (where this Court's choice was in favor of a filed rate and against an unfiled rate):

> This result [enforcing ICC credit regulations] would permit an end-run around the filed rate doctrine. A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would purposely violate various credit regulations such as 49 C.F.R. 1320.3(c) which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only after a carrier goes bankrupt would the illegal discount be brought to light. But because the carrier intentionally failed to give notice to the shipper the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and the shipper. (App. 6a to ICC Petition.)

The court was utterly out at sea in fashioning its thesis. All the discount rates at stake in this case (there are thousands of them in Transcon's tariff and all are placed at risk by the Ninth Circuit) are filed tariff rates and not "privately" made discounts. And any other rate subject to the ICC's credit rules would have to be a filed rate visible to the public (the credit rules apply only to filed tariff rates). The Ninth Circuit suggests that the carrier might "purposely violate various credit regulations". But that is exactly what happened here: Transcon inserted a loss of discount trap in its tariff rule but did not give the actual notice of that prospective penalty on any of its freight bills, in direct contravention of the ICC's rules.

Next, the court laments that "If the ICC goes along, the filed rate would be gutted ... If the ICC looks the other way ... the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper." This is utterly at odds with the undisputed facts of this case or any

other case where a loss of discount provision might be exercised. There was no "illegal bargain struck by the carrier and shipper", as the discount rates originally billed were published in the tariff. There is no joint effort between the shipper and carrier, either publicly or privately. Any attempt to enforce a loss of discount/late-payment penalty is entirely a unilateral operation by the carrier or its trustee-successor.

There is also certainly no occasion for the ICC to "look the other way". The ICC does not receive copies of the carrier's freight bills and would not know that the carrier was not giving the requisite notice to its shippers, until suit is later brought by the carrier. Finally, the only illegality perpetrated in this scenario is by the carrier, initially by failing to comply with the requirement to give actual notice on the freight bill and later by issuing claims for a credit penalty (the full undiscounted rate) in direct violation of the ICC's credit regulations.

In sum, *Maislin* does not support the result reached in this case. This Court's decision that the filed rate prevails over an unfiled rate (subject to ICC primary jurisdiction over the reasonableness of the filed rate) does not support the imposition of an unlawfully claimed penalty rate over a lawfully filed discount rate. And, as this Court made clear in *Reiter* — which was brushed aside in this case — there are other provisions to be given effect in the ICA in addition to the filed rate provision. Just as *Reiter* held that independent recognition must be given to the reasonableness provision, so also the credit provision — and the regulations implementing it — cannot be nullified under cover of paying homage to the filed rate provision.

The central issue in this case is also related to the issue pending before this Court, argued on February 28, 1994, in *Security Services, Inc. v. K Mart Corp.*, No. 93-284. There, the carrier attempted to base undercharge claims on filed rates which did not comply with ICC tariff regulations. In its opinion below, the Ninth Circuit relied upon the views of the circuits

which "have rejected the ICC's attempt to argue that rates filed were void because they did not follow proper filing regulations." But there is a 3-3 split among the circuits on this issue, and this Court should resolve the split in favor of the ICC's position in the *K Mart* case. That decision should provide a further basis for summary reversal of the decision below.

Nor can the Ninth Circuit's decision be reconciled with this Court's decision in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). This Court refused to allow a *judicially* created affirmative defense based on carrier violations of credit rules. However, the Court was careful to note the ICC's primary role in administering its credit regulations. See, *e.g.*, 456 U.S. at 351: "The remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." These remedies include "the power to seek a federal court injunction requiring a carrier to comply with the regulations." 456 U.S. at 349, quoted in the ICC Petition at 14. This is precisely the relief the Ninth Circuit denied.

To the extent that there are differences between this case and *Commercial Metals*, they compound the Ninth Circuit's error. For example, in *Commercial Metals*, the Court noted that the regulations themselves did not provide that a carrier violation precluded collection. The current regulations do prohibit collection of *penalty* charges where the carrier has violated the credit rules. See, *e.g.*, 49 C.F.R. § 1320.2(g)(iii) and (vi). The first of these subsections states that the penalty "shall be applied only to the nonpayment of original separate and independent freight bills and shall not apply to aggregate balance-due claims sought for collection on past due shipments by a bankruptcy trustee, or any other person or agent." Subsection (vi) permits collection "only" where the 90-day rebilling requirement has been met.

It is also important to note that in *Commercial Metals* the shipper was trying to use the carrier's violation of the credit rules as an excuse for paying no freight charges to the carrier. In *Transcon*, freight charges have already been paid, and the issue concerns the carrier's desire to collect a penalty on top of those charges despite its violations of ICC regulations. *Transcon* is, therefore, akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the rule. 456 U.S. at 351. See also *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F.2d 295 (6th Cir. 1988), holding the carrier equitably estopped in a double payment case where its delays in pursuing collection deprived the shipper of notice of the accumulation of charges and led to an escalation of the loss.

Commercial Metals and *Maislin* were seen by the Ninth Circuit as foreclosing, respectively, shipper remedies and injunctive relief for the ICC. But the decision below is wrong on both counts. Aside from *supporting* the Commission's right to seek injunctive relief, as explained above, *Commercial Metals* does not foreclose all shipper remedies in a case like this one. *Maislin* was cited by the Ninth Circuit (ICC Petition, App. 3a) as rejecting the unreasonable practice defense in undercharge cases, but this characterization goes too far. *Maislin* actually acknowledged ICC jurisdiction over unreasonable practices where the issue involves determining which of two filed rates applies. 497 U.S. at 128, n.11.[2] When read in light of this aspect of *Maislin*, the conclusion is inescapable that *Commercial Metals* does not bar a challenge, on unreasonable practice grounds, to Transcon's attempt to substitute *filed* penalty rates for *filed* discount rates, in violation of regulations governing imposition of the former.

[2] Se also *Rocky Mountain Motor Tariff Bureau, Inc. v. ICC*, 590 F.2d 865 (10th Cir. 1979), upholding ICC regulations nullifying special delivery charges in carrier tariffs as an unreasonable practice.

It should also be recognized that nothing in *Commercial Metals* bars a shipper challenge to the filed penalty rate as unreasonable, and *Maislin* and *Reiter & Cooper* specifically provide for such challenges. The ICC also provided for the possibility of such challenges when it allowed carriers to impose loss of discount penalties to cover their collection costs.[3] See *Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment*, 4 I.C.C.2d 340, 343 n.2 (1988) (emphasis added):

> We view loss of discount as a liquidated damages provision because normally it will not recoup the *exact* amount of a carrier's expenditures for court costs, attorney's fees, interest on the unpaid bill, and in-house administration costs. Rather it will constitute a damage assessment that will conclusively and legally satisfy all of a carrier's claims for such costs without requiring documentation to support the precise dollar amount of the charge. *The level of the charge would, of course, be subject to review on reasonableness grounds under 49 U.S.C. § 10701.*

But where, as here, the violation of ICC credit regulations is not only clear, but undisputed, it makes no sense to relegate individual shippers to these fallback defenses. The ICC is empowered by Congress to enjoin carrier violations of the Act. The readiness of the Ninth Circuit to wipe out *all* effective remedies for Transcon's violations, despite this Court's remand of its original decision, plainly demonstrates the need for action by this Court. In *Commercial Metals*, it was noted that "The facts of this case illustrate the problems that may arise when a

[3] Here, of course, Transcon incurred no collection costs as to its original discounted rates, since those rates were paid long before Transcon brought its undercharge actions. Because it violated the ICC's credit regulations, Transcon did not even incur the minimal costs of notifying shippers of late payments.

court ventures to create law in this highly technical field." 456 U.S. at 350, n.11. Those words are equally applicable here.

III. The Decision Has Created A Conflict with Decisions Upholding the ICC's Rules in Other Circuits.

Transcon was not the first bankrupt carrier to file undercharge claims based on the alleged failure of its former shippers to pay freight charges within the tariff credit period. The leading case on the issue of violations of ICC credit regulations in an undercharge case involved The Mennen Company, a member of one of these Shipper Conferences. Asserting that the bankrupt carrier's claims were invalid due to credit rule violations, Mennen obtained referral of the issue to the ICC under the doctrine of primary jurisdiction; and the Commission found such violations to be unreasonable practices in violation of the Act. 1989 WL 239321 (I.C.C.). The District Court subsequently granted summary judgment for the shipper, affirming the ICC's decision, and the Third Circuit affirmed in an unpublished opinion. *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd.* 919 F.2d 134 (3d Cir. 1990).

Summary judgment based on a similar ICC decision in *ADM of Mississippi, Inc.*, 1990 Fed. Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.) was affirmed in an unpublished decision by the Fifth Circuit in *Delta Traffic Service, Inc. v. ADM of Mississippi, Inc.*, No. 91-1098 (5th Cir. 1992).

Though no other courts of appeals have addressed the issue, similar conclusions have been reached in federal district court cases. See, *e.g.*, *Delta Traffic Service, Inc. v. Purdue Frederick Co.*, 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D.Conn. 1989) (referring the credit rules issue to the ICC and citing similar decisions in the District of Delaware and the District of Indiana). The ICC also addressed the credit rules issue and found violations in cases referred by district courts in the Districts of New Jersey and Ohio. See the Commission decisions published at

1990 Fed. Carr. Cas. (CCH) ¶ 37,776 and 1992 Fed. Carr. Cas. (CCH) ¶ 37,951 (1991 WL 259987 I.C.C.).[4]

The most recent decision is *Lifschultz Fast Freight, Inc. v. National Manufacturing Co.*, 804 F.Supp. 1059 (N.D.Ill. 1992), the first post-*Transcon* decision dealing with undercharge claims involving penalties claimed in violation of ICC credit regulations. The court explained (804 F.Supp. at 1064):

> To hold as the court did in *Transcon* in effect renders meaningless all the conditions to an extension of credit in 49 C.F.R. 1320-29. The regulations outlined by the ICC pursuant to its granted authority must be complied with before a carrier can invoke a loss-of-discount remedy. Otherwise, the ICC is stripped of authority as granted by Congress in the Interstate Commerce Act.

The Ninth Circuit brushed aside the contrary decisions of the Third and Fifth Circuits, saying they were unpublished and concerned tariff penalty provisions adopted when ICC credit regulations did not permit such penalties. But this distinction makes no sense. Tariffs either supersede regulations or they don't. If absolute prohibitions against loss of discount penalties in the previous ICC regulations were controlling, restrictions on such penalties in the current regulations must also be given effect.

To date, the credit rules issue presented in this case has confronted three courts of appeals (two of which — the Third and the Fifth — have disagreed with the Ninth Circuit) and district courts in at least three other circuits. The pervasiveness

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[4] A corporate affiliate of Transcon, a bankrupt carrier formerly known as PIE Nationwide, Inc., has filed 30,000 undercharge actions, a number of which involve loss of discount claims. One such case is pending before the ICC on referral by the district court. *Fidelcor Business Credit Corp. v. Dillard Department Stores*, 1992 Fed. Carr. Cas. (CCH) ¶ 83,753 (M.D.Fla. 1992).

and importance of the issue cannot be disputed. Nor can the need for uniformity on a federal question that only this Court can provide. Indeed, collection agents are even now dunning shippers illegally for late payment claims in the Third Circuit on the "authority" of the Ninth Circuit's *Transcon* opinion.

Because of clear and deepening conflicts among the courts of the various circuits as to an issue of nationwide importance, the ICC's Petition should be granted. Otherwise, the bankrupt carriers will be beating a path to the Ninth Circuit.

In contravention of established law, the Ninth Circuit decided to accord the tariff supremacy over ICC regulations. The Ninth Circuit has misread *Maislin*, *Reiter* and *Commercial Metals*. In order to correct the court of appeals' clear error of law, and to prevent irreparable injury to Transcon's former shippers, to other shippers confronting undercharge claims, and to the agency's statutory right to make enforceable regulations, this Court should summarily reverse the decision below.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the ICC's Petition, the ICC's petition for a writ of certiorari should be granted and the Court should enter an order summarily reversing the decision below as inconsistent with *Reiter* and *Commercial Metals*.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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33 pp

QUESTION PRESENTED

Whether, under the filed rate doctrine and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), the Interstate Commerce Commission (ICC) is barred from obtaining an injunction against a motor carrier's attempt to collect charges in violation of the ICC's credit regulations, notwithstanding the ICC's express authority to regulate credit, 49 U.S.C. 10743(b), and to "bring a civil action * * * to enforce" the Interstate Commerce Act and regulations thereunder, 49 U.S.C. 11702.

II

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Interstate Commerce Commission; Transcon Lines; and Leonard Gumport, trustee.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement	2
A. The statutory scheme	2
B. The present controversy	6
Summary of argument	11
Argument	13
The ICC is entitled to seek an injunction against respondents' violations of the agency's credit regulations	13
A. The ICC has statutory authority to enforce its credit regulations through an injunction	13
B. The filed rate doctrine does not preclude the ICC's exercise of its injunctive authority	17
C. This Court's decision in *Maislin* does not support the court of appeals' rejection of the ICC's action	23
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Adams v. *Mills*, 286 U.S. 397 (1932)	26-27
Chevron USA Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	25
Ex Parte No. MC-1, 4 I.C.C.2d 340 (1988)	3, 5, 26
Ex Parte No. MC-177: National Indus. Transp. League—Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates, 2 I.C.C.2d 99 (1986)	24
Ex Parte No. MC-208: Nonoperating Motor Carriers—Collection of Undercharges, 8 I.C.C.2d 742 (1992), rev'd *sub nom. White* v. *United States*, 989 F.2d 643 (3d Cir. 1993)	4

Cases—Continued: Page

Ex Parte No. MC-177: Petition to Institute Rule-making on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) 24
Ex Parte No. MC-1: Regulation for Payment of Rates and Charges—Penalty Charges for Nonpayment, 5 I.C.C. 88 (1988) 26
Ex Parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Nonpayment, 5 I.C.C.2d 691 (1989) 16
Gumport v. *ICC*, 113 S. Ct. 2987 (1993) 8
Hewitt-Robins Inc. v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) 26
ICC v. *American Trucking Assn's*, 467 U.S. 354 (1984).. 25
ICC v. *All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974) 13
ICC v. *Brannon Sys., Inc.*, 686 F.2d 295 (5th Cir. 1982) . 13
ICC v. *Transcon Lines*, 113 S. Ct. 2955 (1993) 10
Keogh v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922) 17
Louisville & Nashville R.R. v. *Maxwell*, 237 U.S. 94 (1915) 17-18
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) 2, 8, 12, 17, 22, 24, 26, 27
Rebel Motor Freight, Inc. v. *ICC*, 971 F.2d 1288 (6th Cir. 1992) 27
Reiter v. *Cooper*, 113 S. Ct. 1213 (1993) 9, 12, 18, 19, 21, 22
Security Services, Inc. v. *KMart Corp.*, No. 93-284 (May 16, 1994) 17, 26
Southern Pacific Transp. Co. v. *Commercial Metals Co.*, 456 U.S. 336 (1982) 2, 5, 9, 11, 14, 15, 16, 22, 23
Texas & Pac. Ry. v. *ICC*, 162 U.S. 197 (1896) 2, 13
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 (1959) 19

Statutes and regulations:

Interstate Commerce Act, 49 U.S.C. 10101 *et seq.* 2
49 U.S.C. 10701 ..... 24, 35
49 U.S.C. 10743 ..... 14, 19

Statutes and regulations—Continued: Page

49 U.S.C. 10743(a) 3, 14
49 U.S.C. 10743(b) 25
49 U.S.C. 10743(b)(1) 3
49 U.S.C. 10761 ..... 3, 20, 24
49 U.S.C. 10761(a) 17
49 U.S.C. 10762 24
49 U.S.C. 10762(a)(1) 3, 17, 20
49 U.S.C. 11702 ..... 19, 20, 21, 22
49 U.S.C. 11702(a)(4) 2, 5, 13, 20
49 U.S.C. 11705(b)(3) 19
49 U.S.C. 11706(a) 22
49 U.S.C. 11906 23
49 U.S.C. 11914 23
Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 2(e), 107 Stat. 2047-2048 24
49 C.F.R. Pt. 1320 ..... 2, 3, 14
Section 1320.1 (1981) 15
Section 1320.2 7
Section 1320.2(b) 3
Section 1320.2(c) 3
Section 1320.2(d) 3
Section 1320.2(e)(3) 3
Section 1320.2(e)(3)(ii)(A) 3
Section 1320.2(g)(1) 4, 26
Section 1320.2(g)(1)(i) 4
Section 1320.2(g)(1)(ii) 4
Section 1320.2(g)(2) 4
Section 1320.2(g)(2)(i) 26
Section 1320.2(g)(2)(iii) 5, 7, 16
Section 1320.2(g)(2)(vi) 5, 7, 16
Section 1320.3(a)(2) 3
Section 1320.3(b)(1) 3
Section 1320.3(c) 4, 7, 16

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-9a) is reported at 9 F.3d 64. The prior opinion of the court of appeals (Pet. App. 10a-40a) is reported at 990 F.2d 1503. The opinion of the district court (Pet. App. 44a-70a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1993. On January 14, 1994, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 23, 1994, and the petition was filed on February 16, 1994. The Court

granted certiorari on April 18, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and the ICC's credit regulations, 49 C.F.R. Pt. 1320, are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 74a-87a).

STATEMENT

The ICC has express authority to "bring a civil action * * * to enforce" the provisions of the Interstate Commerce Act (Act) and regulations thereunder, 49 U.S.C. 11702(a)(4), and this Court has recognized that the Commission's authority includes the "power to seek a federal-court injunction requiring a carrier to comply with the [ICC's credit] regulations." *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 349 (1982). Under review is a judgment of the court of appeals holding that, notwithstanding the ICC's express authority to enforce the Act and its implementing regulations, the ICC is barred by the filed rate doctrine and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), from obtaining an injunction that would prevent respondents, Transcon Lines and its trustee in bankruptcy, from attempting to collect liquidated damages (as compensation for collection costs) from late-paying shippers in direct violation of the ICC's credit regulations.

A. *The Statutory Scheme*

The Act requires that interstate motor common carriers publish their shipping rates in tariffs filed with the ICC, and that carriers charge or receive only those published rates. 49 U.S.C. 10761, 10762(a)(1). Generally, common carriers are required by the Act to retain possession of transported property until the shipper pays the applicable filed rate. 49 U.S.C. 10743(a). If, however, the ICC has promulgated "regulations * * * governing the payment for transportation and service and preventing discrimination," a carrier may "give up possession at destination of property transported * * * before payment." 49 U.S.C. 10743(b)(1). The ICC has promulgated detailed regulations that, accordingly, provide the exclusive means for a motor carrier to release transported property before payment is made, *i.e.*, to release goods on credit. See *Ex Parte No. MC-1*, 4 I.C.C.2d 340 (1988); 49 C.F.R. Pt. 1320 (reproduced in relevant part at Pet. App. 80a-87a).

Under the credit regulations, a carrier may release goods without payment for a credit period not to exceed 30 days.[1] The carrier may assess separate interest charges on a late-paying shipper under 49 C.F.R. 1320.2(e)(3).[2] If the shipper fails to pay the freight

[1] A carrier must generally present a freight bill for payment within seven days, 49 C.F.R. 1320.3(a)(2) and (b)(1), and "[t]he credit period shall begin on the day following presentation of the freight bill." 49 C.F.R. 1320.2(b). The standard credit period is 15 days, 49 C.F.R. 1320.2(c), but the ICC's regulations permit a carrier to provide different standard credit periods in its tariff rules. 49 C.F.R. 1320.2(d). "Such credit periods," however, "shall not be longer than 30 calendar days." *Ibid.*

[2] Interest compensates a carrier for the loss of the use of the money during the delinquency period and ensures that delinquent shippers do not enjoy an advantage over shippers who make timely payments. See 49 C.F.R. 1320.2(e)(3)(ii)(A) (carrier must notify shipper that the "only purpose" of the interest charges (called

charges within the credit period, the carrier may also assess, in addition to the freight charges, "liquidated damages" to compensate it for the cost of collection. 49 C.F.R. 1320.2(g)(1). The ICC's regulations require the liquidated-damages provision to be contained in a tariff filing, and permit liquidated damages to be measured in either of two ways: (1) as a "separate additional charge" (stated as a flat amount or as a percentage of the freight bill), 49 C.F.R. 1320.2(g)(1)(i), or (2) as "the full, non-discounted rate instead of the discounted rate otherwise applicable."[3] 49 C.F.R. 1320.2(g)(1)(ii).

The ICC's regulations place several mandatory conditions on efforts by carriers to collect such liquidated damages. First, the carrier must specifically state the liquidated damages that apply to late payments in the original bill for the shipment. 49 C.F.R. 1320.3(c).[4] Second, the carrier must issue a revised freight bill that includes the liquidated damages charge within 90 days

"service charges" by the rule) "is to prevent a shipper who does not pay on time from having free use of funds due to the carrier").

[3] A carrier typically files tariffs containing tiers of rates, ranging from relatively high, collectively set bureau rates, to a variety of lower "discount" rates for particular traffic and markets. *Ex Parte No. MC 208: Nonoperating Motor Carriers--Collection of Undercharges*, 8 I.C.C.2d 742, 745 (1992), rev'd on other grounds *sub nom. White* v. *United States*, 989 F.2d 643 (3d Cir. 1993). Discount rates are often expressed as a percentage of the bureau rates. (Transcon's rates at issue in this case exemplify that approach. See Vol. I, Resp. C.A. Excerpts of Record 40 (TCON 625, 9th Revised Page 587)).

[4] 49 C.F.R. 1320.3(c) states in relevant part: "When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that 'failure timely to pay freight charges may be subject to tariff penalties' (or a statement of similar import)."

after the expiration of the authorized credit period. 49 C.F.R. 1320.2(g)(2)(vi). Third, the carrier may apply liquidated damages "only to the nonpayment of original, separate and independent freight bills"; liquidated damages may not be applied "to aggregate *balance-due* claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent."[5] 49 C.F.R. 1320.2(g)(2)(iii).

A shipper cannot raise the carrier's violation of the credit regulations in defense of an action to collect the filed rate. *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982). The ICC, however, has "ample authority to police the credit practices of carriers and thereby to deter improper practices," *id.* at 349, and the discretion to frame appropriate "remedies for a carrier's violations of the [credit] regulations," *id.* at 352. In particular, the ICC has the "power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations."[6] *Id.* at 349.

[5] As the ICC explained in promulgating the credit regulations, "[t]he rules expressly limit the application of the collection expense charges only to the initial nonpayment of the original freight bill, and exclude their application to balance-due claims. Balance-due claims involve uncertain and often disputed charges presented by bankruptcy trustees or their assignees concerning shipments that were transported as long as five years prior to the shipper's receipt of the balance-due claim. (This addresses legitimate shipper concerns in this area.)" *Ex Parte No. MC-1*, 4 I.C.C.2d at 346.

[6] The Act authorizes the ICC to "bring a civil action * * * to enforce [the Act] * * * or a regulation or order of the Commission * * * when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11702(a)(4).

B. *The Present Controversy*

1. Transcon Lines was once the twelfth largest motor carrier in the United States. After Transcon filed for bankruptcy, its trustee engaged a rate auditor, collection agency, and collection attorney to review the carrier's tariffs and accounts. As a result of those efforts, respondents sought to collect from shippers approximately $8 million in unpaid freight charges and approximately $15 million in additional, liquidated-damages charges. Pet. App. 15a-16a. Those additional charges were based on claims that the shippers had not paid, within 90 days after shipment, the amount the trustee now claims should have been charged, and that the shippers were therefore not entitled to the discount rate. In such instances, the trustee sought to collect the higher bureau rate. *Id.* at 30a.

The trustee's claim for liquidated damages purported to enforce the terms of Transcon's tariffs filed with the ICC. One of Transcon's tariffs set forth "discount" rates that were expressed as percentages of higher "bureau" tariff rates. Transcon also had a "rules" tariff that contained a "loss-of-discount" provision. That provision stated that discounts "shall apply only when tariff charges are paid within 90 calendar days from the date of shipment," and indicated that payment within that period was a "condition precedent" to application of the discount.[7] Pet. App. 15a, 17a-18a. As respondents

[7] The provision stated (Vol. I, Resp. C.A. Excerpts of Record 41 (TCON 103-A, Item 210)):

have conceded, Br. in Opp. 4-5, the trustee's attempt in this case to enforce its "loss-of-discount" tariff provision violated several of the prerequisites for asserting liquidated damages set forth in the ICC's regulations.

2. The ICC brought this action in district court to enjoin respondents from applying Transcon's loss-of-discount provision to shippers in violation of the ICC's credit regulations. Specifically, the ICC alleged (and it is undisputed) that Transcon's original bills did not advise shippers of the consequence of late payment, as required by 49 C.F.R. 1320.3(c); revised bills were not issued until several years after the 90-day period provided in 49 C.F.R. 1320.2(g)(2)(vi); and the loss-of-discount provision was being applied by a bankruptcy trustee on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii). The ICC requested an injunction that would prohibit respondents from pursuing claims in violation of those requirements. Pet. App. 14a-16a.

The district court granted summary judgment for respondents. The court held that because Transcon's loss-of-discount provision was found in its filed tariff, the ICC's regulations could not be applied to prevent its enforcement. The court concluded that the ICC's regula-

1. [D]iscounts * * * shall apply only when tariff charges are paid within 90 calendar days from date of shipment.

2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 CFR 1322 [*sic*; 1320.2]. This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

tions, as applied here, are not "valid as against the filed rate doctrine."[8] Pet. App. 62a (Tr. 24).

2. The court of appeals affirmed in relevant part.[9] Pet. App. 14a-40a. The court recognized that Transcon's trustee stands in the shoes of the carrier and is therefore subject to the ICC's authority to "bring a civil action of enforcement against the carrier's estate, 49 U.S.C. § 11702." *Id.* at 26a. The court also recognized that the district court had erred in holding that the ICC's credit regulations are simply invalid. *Id.* at 31a, 34a, 40a. Nevertheless, relying on *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), the court of appeals concluded that the ICC could not enjoin respondents from violating the ICC's credit regulations "because the Commission's regulations cannot be enforced in this way to undercut the filed rate." Pet. App. 34a. The court explained (*id.* at 32a):

> Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then has no greater force than the policy rejected in *Maislin*. Although the Act authorizes the ICC to regulate carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

[8] The court also accepted the trustee's argument that Transcon's discount tariffs were invalid because the tariffs identified shippers by account code rather than by name. Pet. App. 58a-60a (Tr. 19-21), 67a (Tr. 31).

[9] The court of appeals reversed the district court's holding with respect to shipper account codes (see note 8, *supra*) on the ground that the trustee lacked standing to challenge the validity of the carrier's own tariffs. Pet. App. 34a-36a. This Court denied the trustee's cross-petition for a writ of certiorari seeking review of that holding, *Gumport* v. *ICC*, 113 S. Ct. 2987 (1993), and that issue is no longer involved in this case.

3. The government filed a petition for a writ of certiorari, arguing that the court of appeals' holding conflicted with the principle of *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993), decided after the court of appeals had issued its opinion in this case. In *Reiter*, this Court ruled that the filed rate doctrine does not preclude the avoidance of the tariff rate based on claims that are specifically authorized by the Interstate Commerce Act. *Reiter* applied that principle to uphold a shipper's right to reparations for an unreasonable rate, holding that the shipper's right can be invoked to "avoid[] * * * the tariff rate," notwithstanding the filed rate doctrine. *Id.* at 1219. The petition suggested that, because *Reiter* established that the assertion of express statutory rights is not precluded by the filed rate doctrine, the court of appeals should be directed to reexamine its holding (*i.e.*, that the ICC cannot assert its enforcement rights in this case) in light of *Reiter*. The petition also suggested, in the alternative, that the Court should consider summary reversal in view of this Court's prior recognition in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, *supra*, that the ICC may enforce its credit regulations through an injunction. This Court granted certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of *Reiter*. *ICC* v. *Transcon Lines*, 113 S. Ct. 2955 (1993).

On remand, the court of appeals concluded that *Reiter* did not require revision of its analysis. Pet. App. 1a-9a. The court read *Reiter* as limited to a holding that claims specifically accorded to *shippers* by the Act are not trumped by the filed rate doctrine. *Id.* at 4a. It thus found *Reiter* inapplicable here, because shippers cannot assert a defense to an action to collect the filed rate based on a credit-regulation violation. *Id.* at 4a, 8a. The court also reasoned that even if the principle announced in *Reiter* were applicable to claims specifically accorded to *the ICC*, the court would still have to determine "which of two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions." *Id.* at 5a, 8a.

In balancing the ICC's statutory authority against the policies of the filed rate doctrine, the court first examined the impact on the filed rate doctrine of allowing the ICC to obtain the injunction it sought here. The court concluded that the ICC might use its injunctive powers to achieve "an end-run around the filed rate doctrine." Pet. App. 6a. The court speculated that shippers and carriers might "privately negotiate a discount from the filed rate" and "purposely violate various credit regulations"; then, "[i]f the ICC goes along" with the illegal subterfuge and uses its injunctive powers to prevent a bankruptcy trustee from collecting the filed rate, "the filed rate doctrine would be gutted." *Ibid.* Next, the court examined the impact on the agency's powers to enforce the credit regulations of denying the ICC authority to seek an injunction here. The court believed that even without injunctive powers, the ICC would have a variety of statutory mechanisms to enforce

the credit regulations, and that those remedies would be sufficient. *Id.* at 6a-7a.

In light of that balance, the court of appeals concluded that it should give priority to the filed rate doctrine. Accordingly, the court held, as in its prior opinion, that because Transcon had put its credit terms in its tariff, the filed rate doctrine precludes the ICC from enforcing its credit regulations against respondents through an injunction. Pet. App. 8a-9a.

SUMMARY OF ARGUMENT

The ICC has express statutory authority to seek an injunction to enforce the provisions of the Act and regulations promulgated under it. While the Act generally requires carriers to collect the tariff rate before relinquishing possession of transported goods, the Act permits carriers to release goods on credit if ICC regulations so authorize. The ICC has promulgated detailed credit regulations, and those regulations, among other things, authorize a carrier to release goods on credit and, if a shipper does not pay within the authorized credit period, to obtain liquidated damages to compensate it for the costs of collection. The regulations contain a variety of requirements, however, to ensure that shippers are given fair notice of the prospect of such collection fees and to prevent abuses. When a carrier (or its bankruptcy trustee) is systematically violating those requirements, the ICC is entitled to enforce them through an injunction that prevents the collection of liquidated damages unlawfully imposed on shippers. See *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982).

The filed rate doctrine does not interpose a barrier to the ICC's injunction action. While the filed rate doctrine

preempts equitable defenses asserted by shippers, this Court has made clear that the doctrine accommodates other provisions of the Act, and, in particular, that it does not bar the assertion of express rights of action against the carrier. *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993). That principle is applicable here; the ICC has express power to seek an injunction to prevent regulatory violations, and it exercised that power in this case. The filed rate doctrine does not prevent the use of that statutory power. The court of appeals' analysis, which weighed the filed rate doctrine against the ICC's need for an injunction, encroached on Congress's judgment to equip the ICC with enforcement authority and on the ICC's discretion about how best to enforce the requirements of the Act.

This Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), does not suggest a contrary result. In *Maislin*, the ICC's interpretation of its general power to define unreasonable practices was found to conflict with the filed-rate requirements of the Act, because the ICC's policy prevented the carrier from collecting the filed rate when it had previously negotiated (and failed to file) a lower rate. In this case, however, the ICC's injunction would not enforce unfiled rates. Rather, it would merely require the carrier to apply the filed rate due upon delivery (with interest) and enforce valid regulations that govern a carrier's conduct when it extends credit and seeks to collect liquidated damages for late payment. Because *Maislin* does not suggest that a carrier may circumvent valid regulations in this context by relying on the filed rate doctrine, *Maislin* does not cast doubt on the ICC's exercise of authority in this case.

ARGUMENT

THE ICC IS ENTITLED TO SEEK AN INJUNCTION AGAINST RESPONDENTS' VIOLATIONS OF THE AGENCY'S CREDIT REGULATIONS

A. The ICC Has Statutory Authority To Enforce Its Credit Regulations Through An Injunction

The ICC is expressly authorized by the Act to "bring a civil action * * * to enforce [the Act] * * * or a regulation or order of the Commission * * * when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11702(a)(4). The statute identifies only one exception to that authority: Section 11702(a)(4) states that the ICC may not bring "a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates." Thus, subject to that single exception, Congress has reposed plenary authority in the ICC to seek civil relief in the courts, in order to enforce the Act and its implementing regulations. See *Texas & Pac. Ry.* v. *ICC*, 162 U.S. 197, 203-204 (1896); *ICC* v. *Brannon Sys., Inc.*, 686 F.2d 295, 296 (5th Cir. 1982) (Section 11702(a)(4) gives the ICC "power to seek injunctive relief to enforce the regulatory process unless the governing statute or regulation expressly denies it such authority"); *ICC* v. *All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974) (enforcing credit regulations for rail carriers through an injunction).

The Act explicitly prohibits transactions on credit except in accordance with ICC regulations. 49 U.S.C. 10743. Under subsection (a) of Section 10743, "[e]xcept as provided in subsection (b) of this section, a common carrier * * * * shall give up possession at destination of

property transported by it only when payment for the transportation or service is made." Subsection (b) states that "[u]nder regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service." Invoking that statutory authority, the ICC has promulgated detailed regulations that govern when a carrier may release goods without payment and when it may collect liquidated damages, as compensation for collection expenses, if a shipper fails to make payment within the authorized credit period. The Commission's regulations, 49 C.F.R. Pt. 1320, contain a variety of requirements that carriers must fulfill to collect liquidated damages.

In *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982), the Court considered "the question whether a common carrier's violation of [the] credit regulations issued by the [ICC] bars the carrier's collection of a lawful freight charge from a shipper-consignor who, under the terms of the shipment's bill of lading, is primarily liable for the charge." *Id.* at 337. In that case, a railroad had delivered goods on credit without undertaking an examination of the creditworthiness of the recipient-consignee who was billed for payment. *Id.* at 339. When the recipient failed to pay, the railroad sought to collect the freight charges from the shipper-consignor, who was liable for payment under the bill of lading.[10] The shipper sought to avoid payment of the freight charges by raising the defense

[10] The carrier in *Commercial Metals* sought to collect only the freight charges due, 456 U.S. at 339; the carrier did not seek to collect damages to compensate it for the cost of collection.

that the carrier's failure to investigate the creditworthiness of the recipient violated the ICC's credit regulations. *Id.* at 340-341; see *id.* at 341 n.6 (quoting requirement in 49 C.F.R. 1320.1 (1981) that a carrier may extend credit "upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part").

This Court held that the violation of the credit regulations did not afford the shipper a defense to an action to collect the filed rate. 456 U.S. at 352. The Court noted that, despite the ICC's "comprehensive[] regulat[ion] [of] credit" transactions, "[n]either the statute under which the regulations were promulgated, nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge" or affords an "affirmative defense to a freight charge action." *Id.* at 344-345 (citation omitted). In addition, the Court found that neither the Act's legislative history nor public policy concerns would justify enforcing the credit regulations through a "judicially created remedy of forfeiture of freight charges." *Id.* at 345-351.

The Court did not indicate, however, that carriers could violate the credit regulations with impunity or collect charges regardless of the nature of the credit-regulation violation. To the contrary, the Court stated that the "the ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices." 456 U.S. at 349. In particular, the Court stated that the agency's remedies include "the power to seek a federal-court injunction requiring a carrier to comply with the regulations." *Ibid.* The Court concluded that "[t]he remedies for a carrier's

violations of the [credit] regulations are best left to the ICC for such resolution as it thinks proper." *Id.* at 352.

In this case, the ICC exercised the power, expressly acknowledged by this Court in *Commercial Metals*, to seek a federal court injunction that would prevent respondents from violating the ICC's credit regulations. Respondents concede, Br. in Opp. 4-5, that its collection actions violate 49 C.F.R. 1320.3(c), 1320.2(g)(2)(vi), and 1320.2(g)(2)(iii). See also notes 4-5, *supra*, and accompanying text. The violations consist of Transcon's repeated failure to have advised shippers in their original bills of the nature and scope of the potential liquidated damages; its failure to have issued revised bills within 90 days of the expiration of the authorized credit period; and the trustee's submission of aggregate balance-due bills to shippers, despite the express bar in the ICC's regulations on the use of liquidated damages in that setting. These collection actions burden shippers with claims that come years after the transportation in question and of which shippers were not given the notice required by the ICC's rules.[11]

Unless restrained by the injunction sought by the ICC, there is every reason to believe that respondents will persist in illegal conduct. Transcon is not an operating carrier whose conduct may be shaped through relief designed to deter future violations, such as fines. Rather, the trustee's sole goal is to enrich Transcon's bankruptcy estate. In pursuit of that goal, the trustee has embarked on a widespread collection campaign aimed at thousands of shippers, while knowing that this course

[11] See *Ex Parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 5 I.C.C.2d 691, 695, 697 (1989).

of action entails myriad violations of the ICC's credit regulations. The purpose of the ICC's injunction action is to prevent those abuses. While the ICC's injunction would prevent the collection of unlawfully imposed liquidated damages, it would not prevent the trustee from collecting the rate billed at the time of shipment and interest on unpaid charges.

B. The Filed Rate Doctrine Does Not Preclude The ICC's Exercise Of Its Injunctive Authority

The court of appeals held that the ICC could not obtain its requested injunction because the injunction would violate the filed rate doctrine. The filed rate doctrine, however, does not prohibit the ICC from exercising its express statutory authority to obtain an injunction to enforce the Act and the credit regulations.

1. The Act requires that a carrier must publish its rates in ICC-filed tariffs, 49 U.S.C. 10762(a)(1), and "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff," 49 U.S.C. 10761(a). Citing those provisions, this Court has interpreted the Act "'to create strict filed rate requirements and to forbid [a shipper from asserting] equitable defenses to collection of the filed tariff.'" *Security Services, Inc.* v. *KMart Corp.*, No. 93-284 (May 16, 1994), slip op. 4, quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 127 (1990); see *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922); *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915). Because Transcon had incorporated its loss-of-discount remedy into its tariff, in order to define the amount of liquidated damages owed by a shipper who fails to make timely payment, the court of appeals concluded that the filed rate doctrine authorized

collection of those charges and required dismissal of the ICC's lawsuit.

The court of appeals' reasoning is incorrect. In *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993), this Court made clear that the filed rate doctrine "does *not* preclude avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." *Reiter*, which was "[i]n many ways * * * a sequel" to *Maislin*, involved the question whether an action to collect the tariff rate should proceed to judgment immediately, before a determination by the ICC of whether the tariff rate was unreasonable as alleged. 113 S. Ct. at 1216. The Court rejected the contention that "the so-called 'filed rate doctrine' gives [the carrier and its trustee] absolute entitlement to judgment on their undercharge claims, without defense or counterclaim." *Id.* at 1219. The Court explained:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. * * * It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself.

Ibid. Applying that principle, the Court concluded that the right of shippers to assert "the reparations rights explicitly conferred by § 11705(b)(3)"[12] is not defeated by

[12] 49 U.S.C. 11705(b)(3) provides in relevant part that "[a] common carrier providing transportation or service subject to the jurisdiction of the Commission * * * is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle."

a claim that the filed rate doctrine bars interference with collection of the filed rate. *Ibid.*

The ICC's right to bring an injunction action in this case follows directly from the principle established in *Reiter*. The ICC's action enforces regulations that are authorized by the specific statutory prohibition against credit transactions except in accordance with ICC rules, 49 U.S.C. 10743, and it is brought pursuant to the agency's civil enforcement authority in 49 U.S.C. 11702. In *Reiter*, the Court held that the filed rate doctrine does not trump "the reparations rights explicitly conferred" by the Act, 113 S. Ct. at 1219; here, by identical reasoning, the filed rate doctrine does not trump the ICC's credit regulations and the agency's enforcement rights explicitly conferred by the Act.[13]

The court of appeals, in response to the Court's direction to reconsider this case in light of *Reiter*, purported to distinguish *Reiter* by noting that that case involved the reparations rights of shippers, and this case involves the enforcement rights of the ICC. Pet. App. 4a.

[13] Respondents suggest (Br. in Opp. 18-19) that both the ICC's power to issue credit regulations and its power to seek injunctions are "*general* requirements" of the Act that do not trump the filed rate doctrine under *Reiter*. In *Reiter*, 113 S. Ct. at 1219, the Court acknowledged that the Act's general reasonable-rate requirement does not provide a defense to a collection action based on the filed tariff, in accordance with its earlier holding in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959). But the credit provision is not a "general" requirement in that sense; it is a specific prohibition against release of goods by carriers without payment, unless the ICC specifically authorizes otherwise. 49 U.S.C. 10743. And the ICC's power to request an injunction (49 U.S.C. 11702) is not a "requirement" of the Act at all; it is a tool for enforcing it. For purposes of the issue here, the two provisions in tandem are fully analogous to the reparations right at issue in *Reiter*.

That distinction between the cases, however, has no relevance to the principle of *Reiter*: the filed rate doctrine does not preclude the assertion of claims for which the Act itself provides. The court of appeals appeared to be influenced by the fact that *shippers* cannot invoke the carrier's violation of the credit regulations as a defense to an action to collect the filed rate. Pet. App. 4a. The flaw in that reasoning, however, is that while *shippers* have no general cause of action to enforce the Act and its regulations, the *ICC* does have such an express right, under 49 U.S.C. 11702.

The fact that the ICC rather than a shipper is enforcing express rights provides no support for the court of appeals' novel approach of balancing the filed rate doctrine against the statutory rights conferred on the ICC, to determine "which provision should be given priority." Pet. App. 5a. To the contrary, Congress has already struck that balance in the provisions of the Act. While carriers are bound to observe the filed rate, 49 U.S.C. 10761, 10762(a)(1), Congress gave the ICC express authority to bring an enforcement action when carriers have violated statutory and regulatory requirements.[14] 49 U.S.C. 11702. The purpose of the ICC's action here is to remedy such statutory and regulatory violations. The filed rate doctrine does not bar that remedy. To the contrary, as this Court explained in *Reiter*, the filed rate

[14] Congress carved out a single exception to the ICC's broad authority to bring a civil enforcement action, for provisions of the Act "governing the reasonableness and discriminatory character of rates." 49 U.S.C. 11702(a)(4). This exception is designed to protect the ICC's primary jurisdiction over issues of reasonableness and discrimination; but there is no exception for remedies that may limit or detract from what courts have come to call the filed rate doctrine.

doctrine yields to "claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." 113 S. Ct. at 1219.

2. In addition to departing from *Reiter*, the court of appeals' balancing test is unsound on its own terms. Rather than interpreting statutory text, the court's approach required it to make policy judgments that properly belong to Congress and the ICC.

In evaluating the strength of the carrier's claim to the protection of the filed rate doctrine, the court of appeals expressed concern that empowering the ICC to enjoin respondent's collection action "would permit an end-run around the filed rate doctrine," because a shipper and carrier could negotiate a secret discount from the filed rate and then "purposely violate various credit regulations." Pet. App. 6a. "If the ICC goes along" with the subterfuge and "looks the other way," the court asserted, "then the filed rate doctrine would be gutted," because "the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper." *Ibid.* Speculation that the ICC might abuse its power by winking at illegal conduct (and that the courts would enforce such an abuse of power), however, is not a proper basis for courts to truncate the scope of the agency's statutory authority. Congress charged the Commission with responsibility to enforce the Act, and, as this Court has recognized, the Commission has a pivotal role in enforcing the credit regulations. *Commercial Metals*, 456 U.S. at 352. If the power that Congress granted were being misapplied—and there is no suggestion in this case or any other that the ICC has used its power to reward illegal conduct—it

is for Congress, not the courts, to rewrite the legislation.[15]

In evaluating the strength of the ICC's need to obtain an injunction, the court of appeals considered the alternative remedies available to the ICC to deter violations of the credit regulations, and concluded that those remedies were adequate to serve the ICC's needs. The court found the ICC's "concern" that it would be unable to enforce the credit regulations without an injunction "exaggerated," because the ICC could invoke other prospective remedies and could impose fines for knowing violations of ICC orders. Pet. App. 6a-7a. The question of how to deploy the Act's remedies, however, rests in the discretion of the ICC. *Commercial Metals*, 456 U.S. at 352. Indeed, the Court in *Commercial Metals* criticized the inflexibility of a judge-made rule that a credit-regulation violation would always prevent a carrier from collecting freight charges, because that rule would bar consideration of factors such as the carrier's intent, the scale of the shipper's responsibility, and the impact of penalizing the violation on the conduct of carriers. *Id.* at 351. Here, the court of appeals' automatic denial to the ICC of the power to seek an injunction would similarly foreclose consideration of

[15] The court of appeals also relied (Pet. App. 8a) on this Court's statement in *Maislin*, 497 U.S. at 132, that the filed rate doctrine is "utterly central to the administration of the Act." As the Court made clear in *Reiter* v. *Cooper*, *supra*, however, the filed rate doctrine does not override other express statutory rights or provisions. The filed rate doctrine is subject to restrictions such as the statute of limitations provision of the Act, see 49 U.S.C. 11706(a) (carrier must bring suit within three years after the claim accrues), and it is subject to the ICC's express enforcement power in Section 11702.

relevant factors. In seeking an injunction, the ICC was entitled to find that the alternative remedies noted by the court—remedies against operating carriers and fines—would be neither logical nor effective against a bankrupt carrier whose trustee is systematically asserting charges in violation of the ICC's credit regulations.[16]

In sum, the court of appeals' evaluation of the relative importance of the filed rate doctrine and the ICC's express authority to enforce its regulations inevitably involved policy determinations that lie beyond the court's authority. The analysis set forth in *Reiter* properly gives effect to the rights explicitly provided in the statute, including the ICC's right to seek a federal-court injunction.

C. This Court's Decision In *Maislin* Does Not Support The Court Of Appeals' Rejection Of The ICC's Action

In its original opinion, the court of appeals found the ICC's injunction action in this case to be invalid for the same reasons that this Court invalidated the ICC policy at issue in *Maislin*. Pet. App. 32a. *Maislin*, however, has no application here.

1. In *Maislin*, this Court considered an ICC policy that was formulated to respond to widespread efforts by bankrupt motor carriers and their trustees retroactively

[16] An enforcement program against operating carriers would not deter bankruptcy trustees from dunning shippers with aggregate balance due bills. And the argument that respondents must be permitted to collect damages from shippers even though respondents may then be subjected to civil or criminal penalties (see 49 U.S.C. 11906, 11914) for doing so in violation of the credit regulations has no basis in the Act or in common sense.

to collect filed tariff rates from shippers who years earlier had negotiated and paid lower rates. While the carriers were obligated to file the negotiated rates in ICC tariffs and shippers believed they had done so, the carriers often failed to make proper tariff filings. The ICC found that such solicitation and billing activities were an "unreasonable practice," and therefore in violation of 49 U.S.C. 10701.[17] This Court disagreed. Relying on the Act's requirements that carriers must file their rates in tariffs and shippers must pay the filed rates, 49 U.S.C. 10761, 10762, the Court held that the ICC was precluded from making the shipper's agreement to a different rate an equitable defense that permitted avoidance of the filed tariff.[18] *Maislin*, 497 U.S. at 126-133.

This case, however, does not involve the enforcement of an ICC regulatory policy that itself conflicts with the filed rate doctrine. The bankrupt carrier in *Maislin* successfully argued that the ICC's policy to enforce unfiled rates was invalid under the text of the statute and this Court's filed-rate-doctrine decisions. The court of appeals in this case, however, assumed that the ICC's credit regulations are valid and enforceable in a wide

[17] See *Ex Parte No. MC-177: National Indus. Transp. League—Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Ex Parte No. MC-177: Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

[18] In the Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 2(e), 107 Stat. 2047-2048, Congress made available an unreasonable practice defense that parallels the defense struck down in *Maislin* to certain shipments occurring before September 30, 1990.

variety of contexts. Pet. App. 6a-7a, 31a, 40a.[19] While *Maislin* holds that the ICC may not use its general "unreasonable practice" powers under 49 U.S.C. 10701 to make it illegal for a carrier to do what other provisions of the Act require, this case does not present that issue. And *Maislin* does not suggest that a carrier may violate *valid* ICC regulations, and then defend against an ICC injunction action by claiming that it was simply following its tariff.

If a carrier could rely on the filed rate doctrine to collect whatever charges were contained in its tariff, regardless of how flagrantly the tariff violates ICC regulations, carriers could effectively nullify ICC requirements through the contents of their tariff filings.[20] It would be particularly paradoxical to hold that credit terms become sacrosanct simply because they are described in a tariff. The Act prohibits the extension of credit absent regulations promulgated by the ICC, and the ICC's credit regulations provide that liquidated damages cannot be collected absent a tariff rule that

[19] Respondents as well take the view in this Court (Br. in Opp. 14) that the ICC's credit regulations are enforceable through fines and other remedies, and they do not argue that the regulations are invalid. Any suggestion to the contrary would be unfounded, in view of the explicit statutory authorization for the ICC to regulate credit transactions, 49 U.S.C. 10743(b), and the deference due to such authorized exercises of agency authority. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[20] The ICC could strike the tariff from its files (and could, in certain circumstances, retroactively reject it), but as this Court has noted, the ICC has for many years lacked the resources to conduct a "comprehensive examination program" of tariffs placed in its files. *ICC* v. *American Trucking Assn's*, 467 U.S. 354, 360 n.4 (1984).

defines those charges. 49 C.F.R. 1320.2(g)(1) and (2)(i). That requirement is an integral part of a regulatory scheme designed to protect shippers against unreasonable and discriminatory charges.[21] It should not be used as a sword to permit the extraction of liquidated damages in violation of regulations that define when and how the liquidated-damages tariff rule may be enforced. Cf. *Security Services, Inc.* v. *KMart Corp.*, *supra*, slip op. 9 (similarly recognizing that the ICC's void-for-nonparticipation regulation governing mileage-based rates validly affords protection against unreasonable or discriminatory charges).

2. *Maislin* is also inapplicable to this case because the ICC's injunction would not require enforcement of negotiated (rather than filed) rates.[22] *Maislin* does not bar the ICC from remedying a violation by "requir[ing] only the application of a different filed rate * * * rather than departure from the tariff schedule entirely." 497 U.S. at 129 n.11 (citing *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86 (1962), and *Adams* v. *Mills*, 286 U.S. 397, 412 (1932)); see *Rebel Motor Freight, Inc.* v. *ICC*, 971 F.2d 1288, 1294 (6th Cir. 1992). At most, that would be the effect of the ICC's requested injunction here. That injunction would not foreclose the carrier from charging a filed rate. Respondents are entitled to collect the filed *discount* rate—the rate due upon delivery of the goods. Respondents can also collect interest charges from late-paying shippers, in order to be made whole for any delay in payment. The effect of the requested injunction is simply to prevent respondents from seeking additional collection charges that clearly violate the credit regulations. Accordingly, the ICC, by seeking to enjoin the liquidated damages claims in this case, is not interfering with collection of a rate in a way that implicates the filed rate doctrine.

[21] See *Ex Parte No. MC-1: Regulation for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 5 I.C.C.2d 88, 90 (1988).

[22] The higher rate that the trustee claims under Transcon's loss-of-discount provision is a way of measuring liquidated damages for late payment. As the ICC explained in promulgating the credit regulations, "[t]he liquidated damages under either the straight charge or the loss-of-discount method will be conclusively legally presumed by us to compensate a carrier for any and all direct and indirect costs associated with its collection effort. This includes, but is not limited to, such costs as attorneys' fees, court costs, collection agency fees, interest on the unpaid bill, and carrier in-house administrative costs." *Ex Parte No. MC-1*, 4 I.C.C.2d 340, 344 n.4 (1988).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether 49 U.S.C. §§10743(b) and 11702(a)(4), which do not specifically provide that they create or authorize exceptions to the filed rate doctrine of 49 U.S.C. §§10761-62, give the Interstate Commerce Commission the right to obtain a federal court injunction that enjoins a motor common carrier from enforcing its duly filed and effective tariff rate provision that the Commission has neither suspended, rejected, nor cancelled.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW i

STATUTES AND REGULATIONS INVOLVED..... 1

COUNTERSTATEMENT OF THE CASE 2

A. Transcon's Bankruptcy 4

B. Transcon's Filed Rate 5

C. ICC's Credit Regulations 6

D. Judgment of District Court 8

E. First Decision of Ninth Circuit 10

F. Second Decision of Ninth Circuit 11

G. Negotiated Rates Act of 1993 11

H. Government's Certiorari Petition 11

SUMMARY OF ARGUMENT 12

ARGUMENT..... 15

I. THIS CASE PRESENTS THE NARROW ISSUE OF WHETHER THE ICC MAY UTILIZE ITS CREDIT REGULATIONS SO AS TO PREVENT ENFORCEMENT OF A CARRIER'S DULY FILED RATE 15

A. The ICC Seeks To Enjoin Enforcement of Transcon's Duly Filed Rate 15

B. The Loss-of-Discount Tariff Provision Did Not State That It Would Apply Only If Transcon Complied with the ICC's Credit Regulations 18

TABLE OF CONTENTS – Continued

Page

II. UNDER *MAISLIN*, THE FILED RATE DOCTRINE OF §§10761-62 REQUIRES THE CARRIER AND THE SHIPPER TO ADHERE TO THE DULY FILED TARIFF RATE UNLESS AND UNTIL THE ICC SUSPENDS, REJECTS, OR CANCELS THE TARIFF 19

III. THE CREDIT REGULATIONS AND THE INJUNCTION SOUGHT BY THE ICC VIOLATE THE FILED RATE DOCTRINE OF §§10761-62 AS INTERPRETED BY *MAISLIN*..... 21

A. Transcon's Filed Rate Included Its Loss-of-Discount Tariff Provision 21

B. By Preventing Enforcement of Transcon's Filed Rate, the Credit Regulations and Injunction Sought by the ICC Violate the Filed Rate Doctrine 22

IV. THE ICC'S PROPOSED INTERPRETATION OF §§10743(b) AND 11702(a)(4) IS INCONSISTENT WITH THE LANGUAGE AND STRUCTURE OF THE ACT 26

A. To Create an Exception to the "Utterly Central" Filed Rate Doctrine of §§10761-62, Congress Must Express a Specific Intention To Do So..... 26

B. The Language of §10743(b) Does Not Reflect a Specific Congressional Intention to Create an Exception to the Filed Rate Doctrine of §§10761-62 28

TABLE OF CONTENTS – Continued

Page

C. The Language of §11702(a)(4) Does Not Reflect a Specific Congressional Intention to Create an Exception to the Filed Rate Doctrine of §§10761-62 30

V. THE ICC'S PROPOSED INTERPRETATION OF §§10743(b) AND 11702(a)(4) IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT 31

A. The Legislative History of §10743(b) Confirms That It Does Not Authorize the ICC To Create an Exception to the Filed Rate Doctrine of §§10761-62 31

B. The Legislative History of the Act Also Shows That Congress Did Not Intend That Federal Courts Would Enjoin Filed Tariffs That the ICC Had Neither Suspended, Rejected, nor Cancelled 34

VI. *COMMERCIAL METALS* DOES NOT SUPPORT THE ICC'S VIEW THAT THE GENERAL PROVISIONS OF §§10743(b) AND 11702(a)(4) CREATE EXCEPTIONS TO THE "UTTERLY CENTRAL" FILED RATE DOCTRINE OF §§10761-62 37

A. *Commercial Metal's* Reasoning Conflicts with the ICC's Position That the Filed Rate Doctrine Is Subordinate to the ICC's Power To Regulate Credit and To Obtain Injunctions 37

TABLE OF CONTENTS – Continued

Page

B. The Seventh Circuit Precedent Cited in *Commercial Metals* Shows That the Injunction Sought by the ICC against the Trustee Is Inconsistent with the Court's Decision 38

VII. THE ICC'S ARGUMENT THAT IT "COULD" STRIKE TRANSCON'S TARIFF IS BOTH IRRELEVANT AND MISTAKEN 39

VIII. THE ICC'S BROAD READING OF FOOTNOTE 11 OF *MAISLIN* IS MISTAKEN 41

IX. THE ICC RETAINS BROAD POWER TO REGULATE CREDIT 45

X. THE TRUSTEE HAS STANDING TO CHALLENGE THE ICC'S CREDIT REGULATIONS 46

XI. THE ICC CONCEDES THAT THE NEGOTIATED RATES ACT OF 1993 DOES NOT ADDRESS THE ISSUE PRESENTED BY THE PETITION 47

CONCLUSION 49

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Adams v. Mills, 286 U.S. 397 (1932) 43

Arrow Transp. Co. v. Southern R. Co., 372 U.S. 658 (1963) ..... *passim*

Berwind-White Coal Mining Co. v. Chicago & Erie R. Co., 235 U.S. 371 (1914) 39

Burlington Northern, Inc. v. United States, 459 U.S. 131 (1982) 31, 46

Carriers Traffic Service, Inc. v. Anderson, Clayton & Co., 881 F.2d 475 (7th Cir. 1989) 44

Davis v. Portland Seed Co., 264 U.S. 403 (1924) 39

Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) 46

Genstar Chemical Ltd. v. ICC, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) 40

Gumport, Trustee v. I.C.C., 147 B.R. 770 (Bankr. C.D. Cal. 1992) 10

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 47

Hewitt-Robbins v. Eastern Freight-Ways, 371 U.S. 84 (1962) 44

ICC v. All-American, Inc., 505 F.2d 1360 (7th Cir. 1974) 38, 39

ICC v. American Trucking Associations, Inc., 467 U.S. 354 (1984) 41, 30, 31, 40, 41, 46

ICC v. Overnight Motor Transp., 24 F. Supp. 751 (E.D. Pa. 1938) 36

ICC v. Transcon Lines, 113 S.Ct. 2955 (1993) 11

TABLE OF AUTHORITIES – Continued

Page

Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922) 20, 25

Louisville & Nashville R. Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924) 20

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) 19

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) ..... *passim*

MCI Telecommunications Corporation v. American Telephone and Telegraph Company, No. 93-356, 511 U.S. ___, 1994 U.S. LEXIS 4639 (1994) 15, 28, 29

North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925) 19

Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) 15

Reiter v. Cooper, 507 U.S. ___, 122 L.Ed.2d 604 (1993) ..... *passim*

Security Services, Inc. v. K Mart Corporation, 511 U.S. ___, 128 L.Ed.2d 433 (1994) 27, 39, 41

Southern Pacific Trans. Co. v. Commercial Metals, 456 U.S. 336 (1982) ..... *passim*

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 26

Standard Brands, Inc. v. Central R. Co. of New Jersey, 350 I.C.C. 555 (1974) 44

State of Texas V. United States, 749 F.2d 1144 (5th Cir. 1985) 46

TABLE OF AUTHORITIES – Continued

Page

Texas & Pacific R. Co. v. Cisco Oil Mill, 204 U.S. 449 (1907) 39

White v. United States, 989 F.2d 643 (3rd Cir. 1993) 10

STATUTES

47 U.S.C. §203 ..... 28, 29

47 U.S.C. §203(b)(1) 29

47 U.S.C. §203(b)(2) 29

49 U.S.C. §10701(a) 20, 26, 49

49 U.S.C. §10701(f) 49

49 U.S.C. §10704 1

49 U.S.C. §10704(b)(1) 30, 46

49 U.S.C. §10704(b)(2) 46

49 U.S.C. §10704(f) 46

49 U.S.C. §10706 1

49 U.S.C. §10708 ..... 1, 30, 35

49 U.S.C. §10708(b) 34, 46

49 U.S.C. §10735 26

49 U.S.C. §10741 19

49 U.S.C. §10743 11

49 U.S.C. §10743(b) ..... *passim*

49 U.S.C. §10743(b)(1) 29

49 U.S.C. §10744 ..... 1, 26, 34

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. §10744(a)(1) 26

49 U.S.C. §10761 ..... *passim*

49 U.S.C. §10762 ..... *passim*

49 U.S.C. §10762(e) 30, 40

49 U.S.C. §11702 1

49 U.S.C. §11702(a)(4) ..... *passim*

49 U.S.C. §11705(b)(3) 30, 36, 41, 45

49 U.S.C. §11706(a) 2, 23

49 U.S.C. §11902 ..... 1, 25

49 U.S.C. §11903 ..... 1, 25

49 U.S.C. §11916 ..... 1, 25

REGULATIONS

49 C.F.R. §1312.14 1

49 C.F.R. §1312.19 ..... 1, 17

49 C.F.R. §1312.21 ..... 1, 17

49 C.F.R. §1320.1 1

49 C.F.R. §1320.2 ..... 1, 8, 24

49 C.F.R. §1320.2(b) 7

49 C.F.R. §1320.2(c) 7, 8

49 C.F.R. §1320.2(d) 7

49 C.F.R. §1320.2(f) 7

49 C.F.R. §1320.2(g)(1)(ii) 6, 7, 17

TABLE OF AUTHORITIES – Continued

Page

49 C.F.R. §1320.2(g)(2)(iii) 2, 7, 22

49 C.F.R. §1320.2(g)(2)(iv) 2, 22

49 C.F.R. §1320.2(g)(2)(vi) 7, 22

49 C.F.R. §1320.2(g)(3) 2, 7, 23, 24

49 C.F.R. §1320.3 ..... 1, 7, 8, 24

49 C.F.R. §1320.3(c) 2, 7, 22

LEGISLATIVE MATERIALS

H.R. Rep. No. 1214, 69th Cong., 1st Sess. (1926) 31, 33, 34

H.R. Rep. No. 2282, 69th Cong., 2d Sess. (1927) 32

47 Cong. Rec. 12755-57 (1926) 31

S. Rep. No. 1508, 69th Cong., 2d Sess. (1927) 31, 33

Hearing on Negotiated Rates Issue and Proposed Legislative Solutions Thereto before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 103rd Cong. 1st Sess. (1993) 48

OTHER AUTHORITIES

Ex Parte No. 73:In re Section 3 of Interstate Commerce Act as Amended February 28, 1920, and March 4, 1927, 171 I.C.C. 268 (1931) 33

Ex Parte No. 73:Regulations for Payment of Rates and Charges, 326 I.C.C. 483 (1966) 46

Ex Parte No. 249 (Sub-No. 1):Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation, 335 I.C.C. 403 (1969) 45

TABLE OF AUTHORITIES – Continued

Page

Ex Parte No. MC-1:Payment of Rates and Charges of Motor Carriers, 2 M.C.C. 365 (1937) 31

Ex Parte No. MC-1:Payment of Rates and Charges of Motor Carriers, 133 M.C.C. 428 (1985) 8

Ex Parte No. MC-1:Regulations for Payment of Rates and Charges – Penalty Charges for Nonpayment, 4 I.C.C.2d 340 (1988) 8, 16, 41

Ex Parte No. MC-1:Resolution for Payment of Rates and Charges – Penalty Charges for Nonpayment, 5 I.C.C.2d 691 (1989) 8

Ex Parte No. MC-170:Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates, 1 I.C.C.2d 146 (1984) 46

Ex Parte No. MC 208:Nonoperating Motor Carriers – Collection of Undercharges, 8 I.C.C.2d 742 (1992) 10

Mohundro's Notes on Motor Carrier Act, 1935 (C.B. Guthrie Tariff Bureau, Inc., 1935) 36

No. 93-1318

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

This case involves the limited power of the Interstate Commerce Commission to regulate credit under 49 U.S.C. §10743(b) and to suspend tariff rates under 49 U.S.C. §10708, both of which derive from the Act of 1927, 44 Stat. 1446, sometimes called "the Newton amendment." The appendix to this brief contains: (1) relevant portions of the Newton amendment, (2) relevant provisions of the Interstate Commerce Act (49 U.S.C. §§10704, 10708, 10744, 10761-62, 11702, 11706, 11902-03, 11916), and (3) relevant credit and tariff regulations of the Interstate Commerce Commission (49 C.F.R. §§1312.14, 1312.19, 1312.21, 1320.1-1320.3).

COUNTERSTATEMENT OF THE CASE

The Interstate Commerce Commission ("ICC") filed this action to enjoin a motor common carrier ("Transcon") and its bankruptcy trustee ("Trustee") from collecting filed tariff rates from Transcon's former customers ("shippers"). In seeking to collect unpaid tariff charges ("undercharges") from shippers, the Trustee relied upon the filed rate doctrine of 49 U.S.C. §§10761-62 and Transcon's duly filed and effective tariffs. Those tariffs included a "loss-of-discount" provision that applied to shippers that paid tariff charges more than 90 days late.

To support enjoining the loss-of-discount provision in Transcon's tariff rate, the ICC invoked its credit regulations. The ICC had issued those regulations under §10743(b), a descendant of the 1927 Newton amendment that Congress enacted to facilitate, not to excuse, compliance with the filed rate doctrine. In violation of the filed rate doctrine, the credit regulations operate to prevent enforcement of Transcon's filed tariff rate for these reasons:

1. Transcon filed its loss-of-discount tariff with the ICC as required by the filed rate doctrine, instead of negotiating an unfiled loss-of-discount rate agreement "wholly outside" the mandatory tariff system (49 C.F.R. §1320.2(g)(3));

2. Transcon omitted to give shippers repeated actual notice of the filed loss-of-discount tariff provision (49 C.F.R. §§1320.2(g)(2)(iv), 1320.3(c)), even though the filed rate doctrine charges shippers with constructive knowledge of the filed rate;

3. Transcon failed to make a demand on shippers for payment of the filed tariff rate within a 90-day time period (49 C.F.R. §1320.2(g)(2)(iv)), even though the applicable limitations period is no less than 18 months under 49 U.S.C. §11706(a); and

4. Transcon put aggregated bills for tariff charges in a single envelope (49 C.F.R. §1320.2(g)(2)(iii)), even though the filed rate doctrine makes the carrier's billing practices irrelevant.

The ICC conceded that Transcon's filed rate under §§10761-62 included Transcon's loss-of-discount tariff provision. The ICC also conceded that the tariff provision itself complied with the Interstate Commerce Act ("Act") and all of the ICC's credit regulations. Nonetheless, the ICC complained that non-tariff conduct of Transcon and the Trustee in seeking to enforce that tariff provision violated the credit regulations. The ICC invoked its statutory authority to promulgate and enforce those credit regulations under 49 U.S.C. §§10743(b) and 11702(a)(4), even though neither provision specifically states that it creates an exception to the filed rate doctrine of §§10761-62.

Both the district court and the Ninth Circuit Court of Appeals correctly refused to enjoin enforcement of Transcon's filed rate, including the loss-of-discount tariff provision. Both courts relied upon *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) ("*Maislin*"), in which this Court determined that §§10761-62 made compliance with the filed rate doctrine "utterly central" to the administration of the Act and declined to find an exception to that doctrine absent a "specific statutory provision" or a "specific congressional intention" to create an exception to the longstanding judicial interpretation of the filed rate doctrine. *See Maislin*, 497 U.S. at 132, 135.

The Ninth Circuit explained to the ICC that its position was not supported by either *Reiter v. Cooper*, 507 U.S. ___, 122 L.Ed.2d 604 (1993) ("*Reiter*"), in which this Court permitted shippers to assert reparations claims "specifically" granted by the Act, or *Southern Pacific Trans. Co. v. Commercial Metals*, 456 U.S. 336 (1982) ("*Commercial Metals*"), in which this Court held that a carrier's violations of the ICC's credit regulations did not give a shipper a defense to its duty to pay the carrier's filed rate. Pet. App 1a-9a.[1]

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[1] "Pet. App.___" refers to pages in the appendix to the Government's Petition for a Writ of Certiorari. "Resp. App. ___" refers to pages in the appendix to Respondent's Brief in Opposition to Petition for Writ of

Following the Ninth Circuit's decision, Congress enacted the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044, which amended Title 49 to create certain specific, express exceptions to the filed rate doctrine. The Government's certiorari petition correctly concedes that the 1993 amendments, which did not amend either §10743(b) or §11702(a)(4), do not address the issue in this case. Pet. 18 n.12.

A. Transcon's Bankruptcy

Transcon was once the twelfth largest motor carrier in the United States, with annual revenues of over $200 million. Pet. App. 15a. Transcon engaged in its operations as a common and contract carrier in interstate commerce pursuant to authority issued to it by the ICC. *Id.*

On May 1, 1990, an involuntary bankruptcy petition was filed against Transcon in the U.S. Bankruptcy Court for the Central District of California. Pet. App. 15a. The bankruptcy of Transcon commenced during the period of illegal rate deregulation promoted by the ICC's "Negotiated Rates" policy. That illegal policy was invalidated by this Court in *Maislin* on June 21, 1990, the month after Transcon's bankruptcy filing.

On July 10, 1990, the bankruptcy court converted Transcon's Chapter 11 case to a Chapter 7 liquidation. Pet. App. 15a. On July 17, 1990, Leonard L. Gumport was appointed Chapter 7 trustee of the Transcon bankruptcy estate. *Id.*

On August 23, 1990, the Trustee obtained authority from the bankruptcy court to employ a rate auditor, a collection agency, and collection attorneys for the purpose of collecting freight undercharges owed Transcon under the filed rate doctrine, 49 U.S.C. §§10761-62. Pet. App. 16a. The Trustee began the process of seeking to recover millions of dollars of

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Certiorari. In addition to appearing at Pet. App. 1a-43a, the two opinions of the Ninth Circuit are officially reported at 990 F.2d 1503 (9th Cir. 1992) and 9 F.3d 64 (9th Cir. 1993).

freight undercharges from shippers that formerly used Transcon[2]. *Id.*

B. Transcon's Filed Rate

The Trustee's freight undercharge recovery effort (and subsequent dispute with the ICC) involved several of Transcon's filed tariffs: (1) a freight classification tariff, (2) bureau tariffs, (3) a discount tariff, and (4) a rules tariff that contained a loss-of-discount provision. The ICC conceded, and the courts below found, that these tariffs together comprised Transcon's filed rate. *See* Pet. App. 30a, 57a-58a.

One rate, called the "bureau rate," was derived from a combination of generally applicable tariffs: the "class rate" and the "bureau tariff." *Id.* at 17a. The class rate came from the National Motor Freight Classification, filed with the ICC on behalf of Transcon and other carriers by the National Motor Freight Classification, Inc. *Id.* The class rate assigned a class to every form of shippable good. *Id.* Bureau tariffs were also filed by agents for various groups of carriers, e.g., the Rocky Mountain Tariff Bureau. *Id.* The bureau tariff determined the cost of movement between any two points in the United States for each shippable good based on its classification under the National Motor Freight Classification. *Id.*

Transcon also filed a tariff labelled TCON 625 that gave shippers discounts from the applicable bureau rate. Pet. App. 18a. In this discount tariff, Transcon identified the shipper by a code number. Transcon kept an index to the code for its own use. The index was neither filed with the ICC nor open to the public. *Id.*

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[2] *Amici* Health and Personal Care Distribution Conference, Inc., et al. represent at page three of their brief that Transcon "filed suits against over 300,000 former customers." This statistic refers to complaints that were filed, but not served, against nearly all of Transcon's former customers to toll the applicable statute of limitations while an extensive rate audit process occurred. Only a fraction of the named defendants were served. The Court may take judicial notice that fewer than 3,000 adversary proceedings are pending in the Transcon bankruptcy case.

In addition, Transcon filed a rules tariff that specified, *inter alia*, when the discounts in TCON 625 applied. Pet. App. 17a-18a. This rules tariff controlled whether a shipper had to pay the discount rate or the bureau rate. Transcon's rules tariff contained this "loss-of-discount" tariff provision:

> 1. Allowances, discounts, exception classes and commodity rates shall apply *only* when tariff charges are paid within 90 calendar days from date of shipment.
> 2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 C.F.R. 1322. This rule simply establishes a condition precedent for the application of the special tariff provisions described in paragraph 1 above.

Vol. I, Resp. C.A. Supplemental Excerpts of Record 41 (TCON 103-A, Item 210) (emphasis added); *see* Pet. App. 18a.[3] Simply put, Transcon's loss-of-discount tariff provides that a discount rate only applies when a shipper pays the discount tariff charge within 90 days from the date of shipment.

C. ICC's Credit Regulations

The ICC's credit regulations appear at 49 C.F.R. Part 1320. They include these provisions:

1. 49 C.F.R. §1320.2(g)(1)(ii) expressly authorizes a carrier to assess a collection charge for late payment by means of a loss-of-discount tariff rule. Section 1320.2(g)(1)(ii) provides that, as liquidated damages for collection costs, carriers may "by tariff rule" require "payment of the full, non-discounted rate instead of the discounted rate

[3] *Amici* Health and Personal Care Distribution Conference, Inc., et al. at page 18 of their brief mistakenly omit the word "only" from their quotation of ¶1 of Transcon's loss-of-discount tariff provision.

otherwise applicable." Also, §1320.2(f) expressly authorizes a carrier, by adoption of a loss-of-discount tariff rule, to condition a discount on early payment: "Carriers may, by tariff rule, authorize discounts for early freight bill payments when credit is extended."

2. 49 C.F.R. §1320.2(g)(3) authorizes a carrier to assess loss-of-discount collection charges "wholly outside of its tariff" through "contract terms in a bill of lading."[4]

3. 49 C.F.R. §1320.3(c) requires a carrier that extends credit to warn the shipper in the "bills or other notice" of "any applicable service charge and/or collection expense charge and discount terms."

4. 49 C.F.R. §1320.2(g)(2)(vi) provides that a carrier can assess a loss-of-discount "only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period."[5]

5. 49 C.F.R. §1320.2(g)(2)(iii) provides that collection costs shall be applied "only to the non-payment of original, separate and independent freight bills and shall not apply to aggregate balance due claims sought for collection on past

[4] The ICC told the Ninth Circuit that the Trustee could not rely upon 49 C.F.R. §1320.2(g)(3), even though Transcon's bill of lading incorporated by reference Transcon's tariffs. The ICC explained that §1320.2(g)(3) only authorized assessment of a loss-of-discount term by means of a bill of lading if the carrier did *not* file a loss-of-discount tariff. *See infra* part III.B, p. 24 n.11.

[5] 49 C.F.R. §1320.2(b) specifies that a carrier's "credit period" begins on the day following the carrier's presentation of the freight bill to the shipper. 49 C.F.R. §1320.3 requires a carrier generally to present its freight bill to the shipper within seven days after the carrier receives the shipment. 49 C.F.R. §1320.2(c)-(d) provide that a carrier's credit period is fifteen days, unless the carrier establishes a longer period of up to thirty days by tariff rule. 49 C.F.R. §1320.2(g)(1)(ii) provides that a carrier's loss of discount tariff may not be set to impose a loss of discount sooner than "after the expiration of the carrier's authorized credit period."

shipments by a bankruptcy trustee, or any other person or agent[.]"[6]

D. Judgment of District Court

On September 17, 1991, the ICC filed an action against Transcon and the Trustee in the U.S. District Court for the Central District of California. Pet. App. 16a, 25a. The ICC alleged that the Trustee's collection efforts violated various provisions of the ICC's credit regulations, 49 C.F.R. §§1320.2-3. Pet. App. 16a.[7]

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[6] These credit regulations are the culmination of a series of amendments that began in 1985, when the ICC promoted deregulation, flexibility, and free competition. *See Ex. Parte No. MC-1: Payment of Rates and Charges of Motor Carriers*, 133 M.C.C. 428, 431 (1985) ("additional competition stemming from credit flexibility clearly is warranted"). The ICC similarly emphasized the "new competitive atmosphere" in 1986, when the ICC adopted its Negotiated Rates policy that this Court invalidated in 1990 in *Maislin*. *See Maislin*, 497 U.S. at 121.

For subsequent amendments to the ICC's credit regulations, *see Ex Parte No. MC-1: Regulation for Payment of Rates and Charges – Penalty Charges for Nonpayment*, 4 I.C.C.2d 340 (1988); *Ex Parte No. MC-1: Regulations for Payment of Rates and Charges – Penalty Charges for Nonpayment*, 5 I.C.C.2d 691 (1989).

[7] *Amicus* Transportation Claims etc. represents at page 5 of its brief that: "The freight bills did not contain a notice about the payment period or loss of discount tariff provision" in compliance with the ICC's credit regulations. However, Transcon's standard form of freight bill did provide in capital letters that: "federal law requires payment of freight charges within 15 days." Vol. I, Resp. C.A. Supplemental Excerpts of Record 26, 43 (Barningham decl. ¶7 and Ex. 3). *See* 49 C.F.R. §1320.2(c)(specifying a 15 day credit period). In addition, the ICC did not dispute that Transcon utilized a form of bill of lading that cross-referenced Transcon's tariffs. *See infra* part III.B, pp. 24 n.11; *see also* Vol. I, Resp. C.A. Supplemental Excerpts of Record 25-26, 42 (Barningham decl. ¶7 and Ex. 2). The standard form of bill of lading states that the carrier receives the shipper's freight subject to the "classifications and tariffs in effect on the date of the issue" of the bill of lading. *See, e.g.*, ICC NMF 100-L, p. 311 (standard short form bill of lading filed with ICC); *Commercial Metals*, 456 U.S. at 342 ("The bill of lading is the basic transportation contract between the shipper-consignor and the carrier").

On October 8, 1991, the Trustee answered the ICC's complaint. Among other things, the Trustee denied that the ICC's credit regulations were in accordance with the statute that authorized such regulations, 49 U.S.C. §10743(b). The Trustee also alleged that the ICC's credit regulations violated "the filed rate doctrine as set forth in *Maislin*." Pet. App. 16a-17a.

Conceding that no material facts were in dispute, both the ICC and the Trustee moved for summary judgment. Pet. App. 25a. The district court, Judge Irving Hill presiding, held a hearing on the cross-motions for summary judgment on November 25, 1991. *Id.*

During the hearing, Judge Hill noted that: (1) the "loss of discount provision seems to be a part of the filed tariff in every situation where the trustee is attempting to collect further monies[,]" and (2) the ICC's copy of the loss-of-discount tariff showed that it was filed with the ICC in 1988. Pet. App. 52a.

In response to inquiries from Judge Hill, counsel for the ICC conceded that: (1) the only relief sought by the ICC was an injunction to prevent the Trustee from enforcing Transcon's filed loss-of-discount tariff provision (Pet. App. 50a-51a), and (2) the loss-of-discount tariff provision was a part of Transcon's "filed rate" within the meaning of *Maislin* (*id.* at 57a-58a).

Judge Hill thereafter granted summary judgment for the Trustee on the basis that the ICC's credit regulations violated the filed rate doctrine of 49 U.S.C. §§10761-62 as articulated in *Maislin* by purporting to prevent enforcement of Transcon's filed loss-of-discount tariff provision. Pet. App. 56a-62a. At no time during the hearing before Judge Hill did the ICC contend that the tariff was ineffective or unlawful, or that it had been suspended or cancelled. *See id.*

E. First Decision of Ninth Circuit

The ICC appealed from the district court's summary judgment in favor of the Trustee. On April 8, 1992, the Ninth Circuit Court of Appeals heard oral argument. During this argument, the ICC's current General Counsel disavowed any contention that Transcon's loss-of-discount was in any way unlawful. Resp. App. 1a-2a.

On June 7, 1992, the Ninth Circuit filed its opinion. Pet. App. 10a. The Ninth Circuit agreed with Judge Hill that, as the ICC had conceded (*id.* at 57a-58a), Transcon's loss-of-discount tariff provision was a part of Transcon's filed rate. *Id.* at 30a. The Ninth Circuit further held that, regardless of whether the ICC's credit regulations were valid, they could not be enforced by means of an injunction "in such a way as to undercut the filed rate requirement. Then *Maislin* governs." Pet. App. 32a.[8]

Following the Ninth Circuit's judgment, the ICC issued regulations that would have precluded the Trustee from enforcing the judgment without the ICC's permission. *Ex Parte No. MC-208: Nonoperating Motor Carriers – Collection of Undercharges*, 8 I.C.C.2d 742 (1992). The bankruptcy court in the *Transcon* case promptly enjoined those regulations, *Gumport, Trustee v. I.C.C.*, 147 B.R. 770 (Bankr. C.D. Cal. 1992), and the Trustee and other carriers obtained a ruling from the Third Circuit that those regulations were invalid. *White v. United States*, 989 F.2d 643 (3rd Cir. 1993).

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[8] In upholding the Trustee's right (and duty) to enforce Transcon's filed loss-of-discount tariff provision, the Ninth Circuit commented:

> The equities here are not necessarily with the late-paying shippers. They enjoyed the extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors. But, under *Maislin*, we need not balance the equities. The filed rate is decisive. (990 F.2d at 1515.)

The Government's brief changes the word "unfair" to "fair." *Compare id.* with Pet. App. 34a.

F. Second Decision of Ninth Circuit

In a summary reconsideration order issued June 14, 1993 at the request of the ICC, this Court vacated the judgment of the Ninth Circuit and remanded for further consideration in light of the Court's recent decision in *Reiter. ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993). Pet. App. 2a.

On remand, the Ninth Circuit again affirmed the summary judgment in favor of the Trustee on his right to collect Transcon's filed rate notwithstanding the ICC's credit regulations. Pet. App. 1a. The Ninth Circuit rejected the ICC's contention that either *Reiter* or *Commercial Metals* stands for the proposition that the ICC can enforce credit regulations by means of an injunction that would operate to override the filed rate doctrine. Pet. App. 4a-5a. The Ninth Circuit emphasized that its holding left the ICC with broad power to enforce its credit regulations. *Id.* at 7a.

G. Negotiated Rates Act of 1993

During 1993, concurrently with the ICC's attempt to overturn the first decision of the Ninth Circuit, the ICC sought legislative relief from Congress, which was then considering a bill that ultimately became the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044. On June 15, 1993, the ICC requested the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation to amend 49 U.S.C. §10743(b) to give the ICC explicit power to issue credit regulations that override the filed rate doctrine. This lobbying effort failed. *See infra* part XI, pp. 47-48. As enacted by Congress and signed into law by the President on December 3, 1993, the Negotiated Rates Act left §§10743 and 11702(a)(4) intact, while amending other provisions of Title 49 to give shippers certain limited, express protections against filed rate claims.

H. Government's Certiorari Petition

In February 1994, the Government filed a petition for certiorari, and requested summary reversal of the judgment of

the Ninth Circuit. Pet. 19. The Government argued that the Ninth Circuit had misinterpreted *Maislin*, *Reiter*, and *Commercial Metals* in holding that the filed rate doctrine precluded the injunctive relief sought by the ICC. The Government's petition conceded that the Negotiated Rates Act of 1993 did not address the issue of the ICC's power under §§10743(b) and 11702(a)(4) to obtain an injunction enforcing its credit regulation so as to prevent a carrier from collecting its filed rate. Pet. 18 n.12. On April 18, 1994, the Court granted the Government's petition, but did not order summary reversal.

SUMMARY OF ARGUMENT

The district court and the Ninth Circuit correctly denied the ICC's request for an injunction. Both the credit regulations and the injunction sought by the ICC violate the filed rate doctrine of §§10761-62 as interpreted by this Court in *Maislin*, *Commercial Metals*, *Reiter*, and other decisions. The ICC is mistaken in its view that the general provisions of §§10743(b) and 11702(a)(4) are exceptions to the "utterly central" filed rate doctrine of §§10761-62. *Maislin*, 497 U.S. at 132. The ICC's position is inconsistent with the filed rate doctrine as interpreted by this Court, and with the language and legislative history of the Act.

In violation of the filed rate doctrine, the injunction would preclude enforcement of an effective (i.e., unexpired), applicable tariff rate that the ICC has never suspended, rejected, nor cancelled. In violation of the filed rate doctrine, the credit regulations, as interpreted by the ICC, prevent a carrier from collecting its duly filed and effective tariff rate should the carrier fail to give the shipper repeated actual notice of the filed rate and bill the shipper in accordance with the ICC's billing requirements. The credit regulations create, as a defense to enforcement of the filed tariff rate, the carrier's error in failing to enforce the filed rate within a time period far shorter than the applicable statute of limitations. The credit regulations also create, as a defense to enforcement of the filed rate, the shipper's failure to receive actual written

notice of the filed rate, even though the shipper is deemed to have constructive knowledge of the filed rate. In precluding Transcon from enforcing its loss-of-discount tariff provision because it was filed, while permitting unfiled, secret loss-of discount arrangements to be enforced free of the technical requirements of the credit regulations, the regulations effectively punish carriers for filing their rates.

Under *Maislin*, the filed rate doctrine of §§10761-62 is "utterly central" to the Act. *Maislin*, 497 U.S. at 132. For this reason, other provisions of the Act will not be interpreted to create an exception to the longstanding judicial interpretation of the filed rate doctrine absent a "specific statutory provision" or a "specific congressional intention" reflecting the existence of such an exception. *Id.* at 135. The Court's decision in *Reiter* adheres to this principle, in that *Reiter* only permitted shippers to assert reparations claims "specifically" provided for in the Act. *Reiter*, 122 L.Ed.2d at 616. Neither the language nor legislative history of §§10743(b) and 11702(a)(4) has the specificity required by *Maislin* to create an exception to the filed rate doctrine.

Both §§10743(b) and 11702(a)(4) are devoid of language that specifies that they create exceptions to the filed rate doctrine of §§10761-62. Instead, the language of those provisions shows that Congress did not intend that they would create exceptions to the filed rate doctrine. The only specific authority that §10743(b) gives the ICC is to permit weekly or monthly payment, and §10743(b) specifically requires that such regulations be aimed at "preventing discrimination . . . ." *Maislin* reaffirmed that strict adherence to the filed rate doctrine is necessary to prevent price discrimination and ensure the reasonableness of rates. Further, in specifically precluding the ICC from seeking an injunction to enforce any provision of the Act "governing the reasonableness and discriminatory character of the rates," §11702(a)(4) reflects the intent of Congress to preclude the ICC from seeking to enjoin a tariff rate unless the ICC first takes action, as required by the filed rate doctrine, to suspend, reject, or cancel the tariff.

The ICC's view of §§10743(b) and 11702(a)(4) also conflicts with the legislative history of the Act. Section

10743(b) derives from the Newton amendment of 1927, which Congress enacted to facilitate, not to excuse, compliance with the filed rate doctrine. Congress permitted carriers to extend credit so that carriers and shippers would have time in which to examine tariffs on file with the ICC to lessen the risk of subsequent claims for undercharges or overcharges. Further, in *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658 (1963) ("*Arrow*"), this Court previously determined that the Newton amendment and its predecessors withdrew from federal courts the power to enjoin rates that the ICC has not suspended.

The ICC's reliance on *Commercial Metals* is mistaken. That decision, and the Seventh Circuit precedent cited with approval in that decision, confirm that the ICC's credit regulations are subject to the requirements of the filed rate doctrine of §§10761-62.

The ICC's argument that it "could" strike Transcon's loss-of-discount tariff provision is irrelevant and mistaken. First, a filed rate is enforceable even if it is technically defective or unreasonable. Second, this argument implicitly concedes that the ICC has not stricken or suspended the tariff provision, so that it remains effective. Third, mere rejection of that tariff provision would not excuse compliance with the filed rate doctrine for transportation services rendered by Transcon prior to the date of rejection, absent retroactive rejection of the tariff provision. Fourth, the ICC cannot meet (and has not sought to meet) the stringent requirements for retroactive rejection set by *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("*ATA*").

Although the ICC's exercise of its powers under §§10743(b) and 11702(a)(4) remains subject to the requirements of the filed rate doctrine of §§10761-62, the ICC retains broad authority to regulate credit and to obtain injunctions, so long as the ICC does not violate the filed rate doctrine. The Trustee's filed rate claims remain subject to reparations counterclaims by shippers under *Reiter*.

Finally, the ICC's certiorari petition concedes that the Negotiated Rates Act of 1993 does not decide the issue before this Court, so that the effect of that 1993 legislation is not presented to this Court for review. Further, that legislation did

not amend either §10743(b) or §11702(a)(4), and Congress declined to add language to §10743(b) proposed by the ICC to support its incorrect interpretation of that provision. The language of the 1993 amendments shows that Congress uses specific language when it wants to create an exception to the filed rate doctrine.

ARGUMENT

I. THIS CASE PRESENTS THE NARROW ISSUE OF WHETHER THE ICC MAY UTILIZE ITS CREDIT REGULATIONS TO PREVENT ENFORCEMENT OF A CARRIER'S DULY FILED RATE

A. The ICC Seeks To Enjoin Enforcement of Transcon's Duly Filed Rate

This case presents only the narrow issue of whether the ICC may use its general authority to regulate the extension of credit under §10743(b) and to obtain injunctions under §11702(a)(4) as a basis to prevent enforcement of a motor common carrier's duly filed rate under §§10761-62. Both the district court and the court of appeals correctly answered that question in the negative, and found that *Maislin* compels the conclusion that §§10761-62 controls. The ICC's general authority under §§10743(b) and 11702(a)(4) cannot be interpreted as urged by the ICC without subordinating the primacy of the "utterly central" filed rate provisions of §§10761-62. *Maislin*, 497 U.S. at 132, *quoting Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986); *see MCI Telecommunications Corporation v. American Telephone and Telegraph Company*, No. 93-356, 511 U.S. ___, 1994 U.S. LEXIS 4639, at *22 (1994) ("*MCI*") (*quoting Maislin* with approval).

The Trustee had no choice but to comply with the requirements of §§10761-62 to collect the funds owed to Transcon under its loss-of-discount tariff provision. *See Commercial Metals*, 456 U.S. at 343 ("a carrier has not only the right but also the *duty* to recover its proper charges") (emphasis added). The ICC recognized this duty in its 1988

decision that authorized carriers to utilize the loss-of-discount tariff method for the recovery of collection costs:

> Under a tariff-rule method of recoupment, at the expiration of the grace period, a carrier *must* affirmatively seek the collection-charge damages due it as provided in the tariff. A carrier has no discretion after the charges become due to waive them or any portion of them. To do so would violate the "filed rate" doctrine applicable to its tariff and unjustly discriminate between other shippers and/or consignees who do not have such fees waived.

Ex Parte No. MC-1: Regulations for Payment of Rates and Charges – Penalty Charges for Nonpayment, 4 I.C.C.2d 340, 346-47 (1988) (emphasis in original). Yet the record below confirms that the ICC's only goal in seeking its injunction was to prevent the Trustee from performing his duty to enforce Transcon's filed rate. At the summary judgment hearing in the district court, the ICC's counsel Mr. Day confirmed this fact:

> THE COURT: . . . . The judgment sought by the plaintiff I.C.C. in this case – the judgment that will be granted if they win today – is a judgment to prevent the trustee from attempting to collect such additional sums by enforcement of the loss of discount provision of the filed rates.
>
> Plaintiff's case is limited to that attempt and the relief sought, the injunction, would be limited to that practice and that collection effort; right?
>
> MR. DAY: Yes, [y]our Honor, that is correct. (Pet. App. 50a.)

During that same important hearing, the ICC also conceded that Transcon's filed loss-of-discount tariff provision was a part of Transcon's "filed rate" within the meaning of the filed rate doctrine as set forth in *Maislin*:

> THE COURT: . . . . For purposes of interpreting *Maislin* and determining what the "filed rate" is, as the term is used in the filed-rate doctrine, I believe that the defendant trustee here is correct as

> it defines that term. Defendant defines the term "filed rate" to include *all* of Transcon's tariffs, including class rates, bureau rates, rules tariffs, and discount rates.
>
> Now, I would like to hear from you, Mr. Day [ICC counsel], whether you take issue with that definition of the term "filed rate."
>
> MR. DAY: Your honor –
>
> THE COURT: Just that question.
>
> MR. DAY: Just that question. No, *I don't take issue with that at all.* (Pet. App. 57a-58a (emphasis added).)

The ICC had to concede this point for several reasons: (1) as the district court noted, the ICC's files reflect that Transcon had filed its loss-of-discount tariff provision with the ICC (Pet. App. 52a); (2) the ICC has not suspended[9] that tariff provision (Govt. Brief 25 n.20); (3) the ICC's credit regulations expressly authorize a loss-of-discount tariff (49 C.F.R. §1320.2(g)(1)(ii)); and (4) in specifying that discounts "*only*" apply when "tariff charges" are paid within 90 days of shipment, Transcon's loss-of-discount tariff unambiguously provides the filed rate that applies to shippers that fail to pay Transcon's discount rates in TCON 625 within 90 days of shipment. *See supra* part B, pp. 5-6.

Because 49 C.F.R. §1320.2(g)(1)(ii) expressly authorizes a loss-of-discount tariff provision, the ICC also had to concede that Transcon's loss-of-discount tariff provision was facially valid. *See infra* part VII, pp. 39-41. The current General Counsel of the ICC conceded this point during argument before the Ninth Circuit Court of Appeals:

> THE COURT: Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading.

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[9] The ICC files a written supplement to an otherwise effective tariff in order to suspend or cancel it. 49 C.F.R. §§1312.19, 1312.21.

> MR. RUSH: No. *We don't contend the tariff violated anything.* We contend that the tariff was one of four things that had to be done in order to be released from the obligation to charge no more than the discounted rate. (Resp. App. 2a (emphasis added).)

B. The Loss-of-Discount Tariff Provision Did Not State That It Would Apply Only If Transcon Complied with the ICC's Credit Regulations

In an attempt to avoid the necessary result under *Maislin* of a conflict between the utterly central filed rate doctrine, on the one hand, and, on the other, any of the general provisions of Title 49, *amici* Health and Personal Care Distribution Conference, Inc., et al. argue that Transcon's loss-of-discount tariff provision has a meaning not attributed to it by either the ICC or the Trustee. According to these *amici*, the loss-of-discount tariff should be read to deprive shippers of their discounted rates only if Transcon complies with all of the ICC's credit regulations, *even if* the shippers failed to pay their discounted tariff rates within 90 days of shipment.

These *amici* make this argument by deleting (without an ellipsis to show the deletion) the word "only" from ¶1 of Transcon's loss-of-discount tariff provision. *See* Brief of the Health and Personal Care etc., et al., at 18. Paragraph 1 of Transcon's loss-of-discount tariff provision states that "discounts . . . shall apply *only* when tariff charges are paid within 90 calendar days from date of shipment." *See supra* part B, p. 6 (emphasis added). This language cannot reasonably be construed to mean that "discounts shall apply sometimes when tariff charges are not paid within 90 days, namely, when the carrier fails to comply with the ICC's credit regulations."

II. UNDER *MAISLIN*, THE FILED RATE DOCTRINE OF §§10761-62 REQUIRES THE CARRIER AND THE SHIPPER TO ADHERE TO THE DULY FILED TARIFF RATE UNLESS AND UNTIL THE ICC SUSPENDS, REJECTS, OR CANCELS THE TARIFF

The statutory duties of a motor common carrier under §§10761-62 to file its rates with the ICC and to adhere to those rates, together with the statutory prohibition against discrimination in §10741, "create strict filed rate requirements and . . . forbid equitable defenses to collection of the filed tariff." *Maislin*, 497 U.S. at 126-27. *Maislin* quoted with approval this "classic statement" of the filed rate doctrine:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Maislin, 497 U.S. at 127, *quoting Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)[10]. *Maislin* also quoted with approval this statement of the filed rate doctrine:

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[10] *Maislin* noted that various commercial services provide "up-to-the-minute details of the carrier's rate schedule." 497 U.S. at 131 n.12. Given the existence of such tariff information services, the rule that shippers moving their freight are presumed to know the filed tariff rate is no harsher than the rule that citizens are presumed to know the law. *See North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes"). In responding to the ICC's contention that "no one reads the tariffs," the Ninth Circuit observed: "If a shipper doesn't read the tariff, would the shipper read the regulations?" Pet. App. 33a.

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . .

Maislin, 497 U.S. at 126, *quoting Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922). The Court in *Maislin* also stated that, under the filed rate doctrine, "[n]or could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor[.]" *Maislin*, 497 U.S. at 127 n.9, *quoting Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924).

In *Maislin*, the Court invalidated the "Negotiated Rates" policy that the ICC had adopted pursuant to the broad and apparently unqualified requirement of §10701(a) of the Act that a carrier's "practice related to transportation . . . be reasonable." Under the Negotiated Rates policy, the ICC relied upon §10701(a) to justify deciding on a case by case basis whether it would be an "unreasonable practice" for a carrier to assert a filed rate claim against a shipper who had paid a negotiated, rather than a filed, rate. *Maislin* held that the ICC's attempt to utilize the seemingly unqualified terms of §10701(a) in this manner violated the filed rate requirements of the Act:

> Compliance with §§10761 and 10762 is "*utterly central*" to the administration of the Act. *Regular Common Carrier Conference v. United States*, 253 US App DC 305, 308, 793 F2d 376, 379 (1986). . . . Although the ICC argues that the Negotiated Rates policy does not "abolis[h] the requirement in section 10761 that carriers must continue to charge the tariff rate," App to Pet for Cert 36a, the policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they

> should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC. (*Maislin*, 497 U.S. at 132-33 (emphasis added).)

III. THE CREDIT REGULATIONS AND THE INJUNCTION SOUGHT BY THE ICC VIOLATE THE FILED RATE DOCTRINE OF §§10761-62 AS INTERPRETED BY *MAISLIN*

A. Transcon's Filed Rate Included Its Loss-of-Discount Tariff Provision

At the summary judgment hearing in the district court, the ICC conceded that Transcon's loss-of-discount tariff provision was a part of Transcon's filed rate within the meaning of *Maislin*. *See supra* part I.A, pp. 16-17. The ICC further conceded that Transcon's loss-of-discount provision was lawful. *Id.* at 17-18; *see also infra* part VII, p. 39 (tariff is enforceable even if technically defective or unreasonable). The Ninth Circuit summarized how the loss-of-discount provision formed a part of Transcon's filed rate:

> . . . . Transcon had on file with the ICC the bureau rate setting out its full charges; its discount rate; and the rules tariff providing that the discounts applied to charges that were paid within 90 days of the date of shipment. Together these filings constituted Transcon's filed rate. None of the filed rates incorporated all the conditions set by the ICC for the extension of credit.
>
> The application of Transcon's filed rate leads (1) to the grant of discounts subject to a condition; (2) to the loss of the discounts when the condition is not met, i.e., payment is not made in 90 days; with the result (3) that the bureau rate governs. (Pet. App. 30a.)

B. By Preventing Enforcement of Transcon's Filed Rate, the Credit Regulations and Injunction Sought by the ICC Violate the Filed Rate Doctrine

The ICC conceded that, based on its credit regulations, it sought an injunction that would prevent enforcement of the loss-of-discount tariff provision in Transcon's filed rate. *See supra* part I.A, pp. 16-17. Both the credit regulations and the injunction sought by the ICC would violate four separate rules embodied in the filed rate doctrine of §§10761-62.

First, the credit regulations conflict with the rule of the filed rate doctrine that makes ignorance or misquotation of rates irrelevant to the duty of the carrier and shipper to adhere to the carrier's filed tariff rate. *Maislin*, 497 U.S. at 126-28. In violation of this rule, the credit regulations, in the ICC's view, make the carrier's misquotation of the loss-of-discount tariff provision, or the shipper's lack of notice of that tariff provision, a defense to its enforcement. For example, 49 C.F.R. §1320.3(c) requires the carrier's "bills or other notice" to state the "discount terms." Also, §1320.2(g)(2)(vi) requires the carrier to send the shipper a second notice of the tariff provision, in the form of a "revised freight bill or notice," within 90 days after expiration of the carrier's credit period. Lastly, §1320.2(g)(2)(iv) precludes application of the tariff provision when the late payment results from "clerical or ministerial error."

Second, the credit regulations conflict with the rule of the filed rate doctrine that no act or omission of the carrier (except the running of the statute of limitations) can estop or preclude the carrier from enforcing payment of the filed rate. *Maislin*, 497 U.S. at 127 n.9. In violation of this rule, the credit regulations make the carrier's failure to send bills in separate envelopes, or in a timely manner, a defense to payment of the rate specified in Transcon's loss-of-discount tariff. *See* 49 C.F.R. §§1320.2(g)(2)(iii), 1320.2(g)(2)(vi), 1320.3(c). Further, §1320.2(g)(2)(vi) requires the carrier to send a second bill within 90 days after expiration of the credit period as a condition to collecting the loss-of-discount

tariff charge, but the statute of limitations for filed rate claims for freight transported prior to December 3, 1993 is three years under 49 U.S.C. §11706(a), and no less than 18 months for freight transported thereafter (*id.*). The Ninth Circuit described how the credit regulations operate to permit the carrier's acts and omissions to circumvent compliance with the filed rate doctrine:

> A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would purposely violate various credit regulations such as 49 C.F.R. 1320.3(c), which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only after a carrier goes bankrupt would the illegal discount be brought to light. But because the carrier intentionally failed to give notice to the shipper, the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and the shipper. (Pet. App. 6a.)

Third, the credit regulations conflict with the rule of the filed rate doctrine that the ICC does not have the power to adopt a policy that, "by sanctioning adherence to unfiled rates, undermines the basic structure of the Act." *Maislin*, 429 U.S. at 132. In violation of this rule, the credit regulations sanctify secret, unfiled loss-of-discount arrangements, and punish such carriers as Transcon that file their loss-of-discount tariffs. Specifically, 49 C.F.R. §1320.2(g)(3) permits a carrier to opt out of all of the complex requirements of the ICC's credit regulations if the carrier assesses collection charges "*wholly outside* of its tariff . . . [through] contract

terms in a bill of lading." *Id.* (emphasis added)[11]. Under §1320.2(g)(3), Transcon would have the right to collect its loss-of-discount tariff rate if Transcon *refrained* from filing its loss-of-discount tariff provision with the ICC. The regulations punish Transcon for filing its loss-of-discount tariff provision by precluding enforcement of that tariff provision, merely because Transcon and its Trustee did not comply with the complex multiple notice rule and short limitations period of §§1320.2-3 that do *not* apply to non-filing carriers. Credit regulations that prevent common carriers from collecting their duly filed and effective rates, but permit these same carriers to privately contract with shippers and to make secret and unsupervised collection charges do not further §10743(b)'s mandate that the regulations "prevent[ ] discrimination," since the duty to file and adhere to filed tariff rates has always been considered "essential" to prevent discrimination. *Maislin*, 497 U.S. at 126.

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[11] The ICC's March 6, 1992 reply brief, at 4-5, represented to the Ninth Circuit that Transcon failed to comply with the requirement of 49 C.F.R. §1320.2(g)(3) as follows:

> Finally, the Trustee disingenuously suggests (Br. at 46-48) that the reference in Transcon's bills of lading to its tariffs (which in turn contained the loss-of-discount provision) brought Transcon within an alternate part of the ICC's credit regulations. The credit regulations require a carrier to choose between two mutually exclusive methods to recoup collection costs from shippers who do not pay their freight charges. One method is to assess liquidated damages (through published tariff rules), under either 49 CFR 1320.2(g)(1)(i) or (ii); the other approach is to recover collection costs by a separate contract reflected in the bill of lading, under 49 CFR 1320.2(g)(iii). Transcon clearly chose the tariff approach (see Trustee's Br. at 11-12, 18), and the Trustee cannot alter that now. In any event, a mere reference to the tarif n the bill of lading, coupled with an acknowledgment of the shipper that it is familiar with the terms of the tariff, is not sufficient to bring into being a separate contract in the bill of lading under 49 CFR 1320.2(g)(iii).

Fourth, the relief sought by the ICC violates the rule of the filed rate doctrine that the filed tariff rate is the binding legal rate, "[u]nless and until suspended or set aside" by the ICC. *Maislin*, 497 U.S. at 126, *quoting Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922). In violation of this rule, the federal court injunction sought by the ICC would preclude enforcement of Transcon's filed tariff rate even though the ICC concededly never suspended or set aside that tariff rate. The ICC's brief implicitly concedes that the tariff remains in effect by stating that the "ICC *could* strike the tariff from its files . . . . " Govt. Brief 25 n.20 (emphasis added). The ICC's statement that it "could" strike the tariff necessarily implies that: (1) the ICC has not struck the tariff, and that (2) the ICC's credit regulations do not have the effect of suspending or cancelling Transcon's loss-of-discount tariff[12].

The provisions of 49 U.S.C. §11916 confirm that the ICC's credit regulations conflict with the filed rate doctrine. Under §11916, Transcon's loss-of-discount tariff provision would be "conclusive proof" in any enforcement proceeding arising from Transcon's failure to collect its filed rate under §§10761-62 and 11902-03. But the ICC, under its credit regulations, wants to take the position that Transcon has a legal duty to refrain from collecting that filed rate. Thus, if Transcon performs its legal duty under the filed rate doctrine in order to avoid liability under 49 U.S.C. §§11903 and 11916, then Transcon violates the ICC's credit regulations. If Transcon complies with the ICC's credit regulations by refraining from enforcing Transcon's filed rate, then Transcon violates the filed rate provisions of §§10761-62 and incurs liability under §§11903 and 11916.

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[12] The ICC is mistaken in alleging that it "could" strike the loss-of-discount tariff provision. *See infra* part VII, pp. 39-41.

IV. THE ICC'S PROPOSED INTERPRETATION OF §§10743(b) AND 11702(a)(4) IS INCONSISTENT WITH THE LANGUAGE AND STRUCTURE OF THE ACT

A. To Create an Exception to the "Utterly Central" Filed Rate Doctrine of §§10761-62, Congress Must Express a Specific Intention To Do So

In *Maislin*, the Court declined to find that the ICC's general authority to regulate an "unreasonable practice" under §10701(a) created an implied exception to the filed rate provisions of §§10761-62. In reaching that conclusion, the Court noted that the shipper "pointed to no *specific* statutory provision or legislative history indicating a *specific* congressional intention to overturn the longstanding" judicial interpretation of the Act. *Maislin*, 497 U.S. at 135, *quoting Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986) (emphasis added). *Maislin* illustrated this point by noting that §10735 provides a specific exception to the filed rate doctrine for household goods carriers:

> This exception for household goods carriers also demonstrates that Congress is aware of, but has elected not to eliminate as applied to other motor common carriers, the general requirements of §§10761 and 10762. (*Maislin*, 497 U.S. at 135 n.15.)

Another example of a specific exception in the Act to the filed rate doctrine appears in §10744. It expressly relieves certain consignees (but not consignors, shippers, or beneficial owners of the freight) of liability for filed rate claims that arise after delivery of the shipment:

> . . . . When the shipper or consignor instructs the carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery . . . . (49 U.S.C. §10744(a)(1).)

The Court's post-*Maislin* decisions adhere to the principle that, to support an exception to the filed rate doctrine of §§10761-62, there must be specific statutory language or legislative history that shows a specific congressional intention to create the exception.

In 1993, in *Reiter*, the Court again stated that it agreed that the filed rate doctrine "does *not* include any 'unreasonable-rate defense,' derived from the *general* ICA requirement (now codified in §10701(a)) that a carrier's rates be 'reasonable.' " *Reiter*, 122 L.Ed.2d at 616 (emphasis added). The Court further concluded that the filed rate doctrine did not preclude shippers from avoiding the tariff note "through claims and defenses that are *specifically* accorded by the ICA itself." *Id.* at 616 (emphasis added). The Court noted that the ICC "has long interpreted [the Act] as giving it no power to decree reparations relief[,]" so that shippers must in the first instance seek reparations by means of a civil action filed in court. *Id.* at 618. Thus, *Reiter* declined to find that a "general" provision of the Act could be interpreted to create an exception to the filed rate doctrine, and instead merely held that the filed rate doctrine did not obliterate a statutory cause of action for reparations "specifically" conferred by the Act in §11705(b)(3).

In *Security Services, Inc. v. K Mart Corporation*, 511 U.S. ___, 128 L.Ed.2d 433 (1994) ("*KMart*") this Court strictly enforced the filed rate doctrine against a carrier that had no effective filed tariff rate. In *KMart*, the carrier's filed tariffs were missing an essential element. In particular, the carrier's mileage tariff listed its mileage rates, and cross-referenced another tariff, a mileage guide tariff, that specified the distances between the shipping points to which the carrier's mileage rates applied. However, the mileage guide tariff expressly provided that it only applied to participating carriers specifically named in a supplement to the mileage guide tariff. That supplement did not include the name of the carrier. As a result, the carrier had mileage rates, but no distances from which the tariff charge could be computed. Since the carrier's tariffs were incomplete on their face, the carrier had no filed rate to enforce. Because the carrier had no

effective filed rate, the Court upheld the ICC's void-for-nonparticipation regulations that provided that, in such circumstances, the carrier had no effective tariff rate. In effect, the ICC's void-for-nonparticipation regulations merely restated the result dictated by the filed rate doctrine: a fundamentally incomplete filed rate is ineffective and void.

Most recently, in *MCI*, the Court invalidated the FCC's attempt to limit the tariff filing requirements of non-dominant communications common carriers under 47 U.S.C. §203, even though §203 gave the FCC general, but not specific, authority "to modify" the filed rate doctrine. Like 49 U.S.C. §§10761-62, 47 U.S.C. §203 "establishes a rate-regulation, filed-tariff system for common carrier communications[.]" *MCI*, 1994 U.S. LEXIS 4639 at *28-29. Describing the FCC as an "analog" of the ICC, the Court referred to the tariff-filing requirement as "the heart of the common carrier section of the Communications Act." *Id.* at *34.

Neither §10743(b) nor §11702(a)(4) specifically provides that it creates an exception to the filed rate provisions of §§10761-62. Under *Maislin*, *Reiter*, and *MCI*, the absence of such specific language precludes interpreting those general provisions to create exceptions to the filed rate doctrine. As described below, the language that does appear in §§10743(b) and 11702(a)(4) shows that they do not create exceptions to the filed rate doctrine.

B. The Language of §10743(b) Does Not Reflect a Specific Congressional Intention to Create an Exception to the Filed Rate Doctrine of §§10761-62

The language of §10743(b) shows that it does not create an exception to the filed rate doctrine. The only type of credit regulation that §10743(b) expressly authorizes is one that provides "for weekly or monthly payment for transportation or service." This minor grant of authority to the ICC to authorize delays in payment hardly suggests that Congress intended §10743(b) to confer major authority on the ICC to repeal the "utterly central" requirements of §§10761-62. A

similar statutory structure led this Court to reject the FCC's contention that 47 U.S.C. §203 permits the FCC to create a broad exception to the filed rate doctrine of the Communications Act:

> [A] further indication that the §203 authority to "modify" does not contemplate fundamental changes is the sole exception to that authority which the section provides. One of the requirements of §203 is that changes to filed tariffs can be made only after 120 days notice to the Commission and the public. §203(b)(1). The *only* exception to the Commission's §203(b)(2) modification authority is as follows: "except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." Is it conceivable that the statute is indifferent to the Commission's power to eliminate the tariff-filing requirement entirely for all except one firm in the long-distance sector, and yet strains out the gnat of extending the waiting period for tariff revision beyond 120 days? We think not. (*MCI*, 1994 U.S. LEXIS 4639, at *19 (emphasis added).)

Equally compelling is the express language of §10743(b)(1) that requires credit regulations adopted by the ICC to serve the purpose of "preventing discrimination[.]" Those terms confirm that the ICC has no authority to use its ability to regulate credit as a basis to override the requirements of the filed rate doctrine. This conclusion follows from *Maislin*:

> The duty to file rates with the Commission, see §10762, and the obligation to charge only those rates, see §10761, have always been considered essential to preventing price discrimination . . . .

Maislin, 497 U.S. at 126. Because the filed rate doctrine is "essential to preventing price discrimination" (*id.*), §10743(b)'s requirement that the credit regulations "prevent[ ] discrimination" cannot mean that the ICC has authority to

adopt regulations that eliminate the Act's "essential" means of preventing discrimination.

C. The Language of §11702(a)(4) Does Not Reflect a Specific Congressional Intention to Create an Exception to the Filed Rate Doctrine of §§10761-62

Section 11702(a)(4) expressly provides that the right of the ICC to obtain an injunction under that provision does *not* extend to an action "under a provision of this subtitle governing the reasonableness and discriminatory character of rates[.]" This exception in §11702(a)(4) reflects that the Act contemplates that federal courts shall *not* enjoin tariff rates that the ICC has neither suspended, rejected, nor cancelled.

The Act contemplates that the ICC, not federal courts, will supervise tariff rates by suspending them under §10708, rejecting them under §10762(e), or ordering the old rate cancelled and prescribing the new rate to be followed under §10704(b)(1). "A primary responsibility of the [ICC] is to supervise and approve tariffs submitted under the [Act]." *ATA*, 467 U.S. at 367. Under 49 U.S.C. §10762(e), the ICC "is expressly empowered to reject tariffs prior to their effective date." *Id.* Under 49 U.S.C. §10708, the ICC's "power to suspend is limited to the seven months after the proposed tariff's effective date, and final action in a suspension-investigation proceeding can be taken only after a full hearing." *ATA*, 467 U.S. at 363-64. After the expiration of the seven month suspension period, unless the ICC has taken final action to suspend the rate, the tariff becomes effective, subject to the shipper's right to receive reparations under 49 U.S.C. §11705(b)(3) in the event the ICC ultimately determines the rate to be unlawful. Unless and until the effective tariff rate is set aside by the ICC through formal administrative proceedings, a federal court has no power to enjoin enforcement of the rate. *See Arrow*, 372 U.S. at 665 ("Congress was aware . . . that some shippers might for a time have to pay unlawful rates because a [suspension] proceeding might not be concluded and an order made within the reduced

time"). In "narrow circumstances" the ICC, not a court, can retroactively reject an effective tariff after the suspension period. *See ATA*, 467 U.S. at 365; *Arrow*, 372 U.S. at 667 (Act's vesting of tariff suspension power in ICC reflects intent of Congress "to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief"); *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 139 (1982) ("*Burlington Northern*") ("we emphasized [in *Arrow*] that court-ordered injunctions were inconsistent with the congressional intent to vest ratemaking decisions in the Commission").

In summary, the ICC's interpretation of the exception clause of §11702(a)(4) undermines the structure of the Act by shifting to federal courts the ICC's responsibility for the supervision of tariffs.

V. THE ICC'S PROPOSED INTERPRETATION OF §§10743(b) AND 11702(a)(4) IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT

A. The Legislative History of §10743(b) Confirms That It Does Not Authorize the ICC To Create an Exception to the Filed Rate Doctrine of §§10761-62

The legislative history of §10743(b) confirms that Congress gave the ICC power to regulate credit in order to facilitate, not to excuse, compliance with the filed rate doctrine.

The statutory ancestor of §10743(b) is the Act of 1927, 44 Stat. 1446, called the "Newton amendment" after Representative Newton, the member of the House Committee on Interstate and Foreign Commerce who sponsored the bills that resulted in the 1927 legislation that enlarged the ICC's power to regulate credit. *See Ex Parte No. MC-1: Payment of Rates and Charges of Motor Carriers*, 2 M.C.C. 365, 375 (1937) (referring to the "Newton amendment"); H. R. Rep. No. 1214, 69th Cong., 1st. Sess. (1926); 47 Cong.Rec. 12755-57 (1926); S. Rep. No. 1508, 69th Cong., 2d Sess. (1927); H. R. Rep. No.

2282, 69th Cong., 2d Sess. (1927). The Newton amendment amended the Act to provide:

> No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . .

44 Stat. at 1447. In substantially similar form, with the addition of the words "including rules and regulations for weekly and monthly settlement," the Newton amendment became §223 of the Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543, 565-66. In 1978, Congress recodified that provision as current §10743(b), changing the word "settlement" to "payment," but expressly providing that the recodification did not alter the meaning of the statutory terms. 92 Stat. 1337, 1391, 1466.

The legislative history of the Newton amendment shows that Congress authorized carriers to extend credit, and the ICC to make credit regulations, in order to give carriers and shippers time to check the filed tariff rate to make certain that they were complying with it. A short time after the enactment of the Newton amendment, the ICC provided the following interpretation of it:

> . . . . The [pre-1927] statute as interpreted by us, did not authorize us to prescribe rules permitting the carriers to extend credit to shippers in order that shippers might audit their freight bills and thereby guard against claims for overcharges or undercharges. The only change in the law made by the [Newton] amendment is that now we are not restricted to making rules that assure prompt payment of freight charges. *We may permit carrier to extend credit for a reasonable time to shippers for the purpose of auditing freight bills or to meet other exigencies of business* . . . .

Ex Parte No. 73: In re Section 3 of Interstate Commerce Act as Amended February 28, 1920, and March 4, 1927, 171 I.C.C. 268, 270 (1931) (emphasis added). In sponsoring the legislation that ultimately became the Newton amendment, Representative Newton provided a nearly identical explanation:

> . . . . The provisions of existing law provide that no carrier shall deliver freight until all charges have been paid, except under such rules as the Interstate Commerce Commission shall prescribe to "assure the prompt payment" of those charges. Under these regulations "assuring prompt payment," payment must be made within about 48 or 72 hours. Many receivers of freight felt that this time is too short for this reason. *It gives practically no time in which to study the freight bills and to compare the rate charged with the rate in the carrier's established tariff so as to see whether or not any errors have been committed. As a result, there has been a demand on the part of a great many shippers for an opportunity to make weekly settlement of their freight charges. Of course, this should only be done under suitable rules and regulations. . . . By making these weekly settlements, shippers would, before payment of the charges, have time to make some investigation of the existing tariff with the idea of correcting any mistake prior to making settlement. If this were possible, it would obviate considerable expense to both carriers and shippers, growing out of the making of overcharges and undercharges.*

H. R. Rep. No. 1214, 69th Cong., 1st Sess. 2 (1926) (emphasis added); *see also* S. Rep. No. 1508, 69th Cong., 2d Sess. 2 (1927) (same explanation).

In summary, the legislative history of the Newton amendment reflects that the ICC misapprehends the purpose of its authority to regulate credit. Congress gave that authority to the ICC to permit carriers and shippers to trade on credit while they checked the filed tariffs to conform their conduct to the requirements of the filed rate doctrine. Disregarding

this clear congressional intent, the ICC's regulations, as now interpreted by the ICC, operate to prevent the carrier from performing its duty to collect the filed rate.[13]

B. The Legislative History of the Act Also Shows That Congress Did Not Intend That Federal Courts Would Enjoin Filed Tariffs That the ICC Had Neither Suspended, Rejected, nor Cancelled

The Newton amendment increased the ICC's suspension period to seven months, 44 Stat. 1447-48, in order to give the ICC more time to review the lawfulness of a proposed new tariff rate before it took effect. *See* H. R. Rep. No. 1214, 69th Cong., 1st Sess. 4 (1926) (the purpose of the suspension period "is to prevent the new rate from becoming effective until the question of its justness and reasonableness can be determined"). The seven month suspension period created by the Newton amendment in 1927 now appears in §10708(b). *See Arrow*, 372 U.S. at 665 ("The suspension provisions took their present form, vesting authority in the Commission to suspend for a maximum period of seven months, in the Act of 1927").

In *Arrow*, rail carriers filed and published new rates that went into effect after the suspension period. A competing carrier and others requested a federal district court to enjoin the rail carriers from enforcing their new rates. The district court found that the new rates might well cause irreparable

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[13] Another portion of the Newton amendment confirms the conclusion that Representative Newton sought to facilitate compliance with the filed rate doctrine, not to sow the seeds of its destruction by the ICC. The Newton amendment amended the filed rate doctrine to provide that an agent-consignee of a shipper could avoid liability for filed rate claims, but, in that event, the consignor/shipper would remain liable for such claims. 44 Stat. 1447. *See* H.R. Rep. No. 1214, 69th Cong., 1st Sess. 3 (1926) ("To avoid any possibility of this [limitation on the consignee's liability] being used for rebating or discrimination by the carrier as between shippers, the amendment makes the consignor liable in those instances for the additional charges"). This limited, specific exception to the filed rate doctrine now appears in 49 U.S.C. §10744.

injury to the plaintiffs. *Arrow*, 372 U.S. at 660-61. The district court nevertheless declined to enjoin the new rates, and explained that Congress had vested in the ICC the exclusive power to suspend rates. *Id.* at 661-62. This Court affirmed. The Court traced the development of the ICC's statutory suspension power through the 1927 Newton amendment. *Id.* at 662-67. From this history, the Court determined that Congress vested the suspension power in the ICC (*see* §10708) to abolish the "diverse results" and "competitive inequities" caused by federal court injunctions against enforcement of filed tariff rates. *Arrow*, 372 U.S. at 663. The Court ruled:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. (*Arrow*, 372 U.S. at 667.)

The ICC overlooks the foregoing history of the Act in arguing that §11702(a)(4) should be construed to permit a federal district court to enjoin enforcement of a filed tariff rate that the ICC has neither suspended, rejected, nor cancelled. The ICC's view of its right to enforce its credit regulations through a federal court injunction under §11702(a)(4) would revive the federal equity practice that *Arrow* holds the Act abolished during the 1920's.

The ICC cannot effectively distinguish *Arrow* by arguing that it involved a request for injunctive relief by private parties, instead of the ICC. The structure of the Act is not susceptible to that distinction. Currently, as in 1927, the Act limits the ICC's suspension power to seven months. *See* 49 U.S.C. §10708; *Arrow*, 372 U.S. at 665-66. It would do violence to that statutory structure to interpret it to mean that: (1) the ICC's suspension power is limited to seven months, but (2) after seven months, the ICC may obtain a non-statutory increase of the suspension period by getting a federal court to enjoin enforcement of the rate, even though the

ICC has neither before nor after the suspension period suspended, rejected, or cancelled the rate. As *Arrow* notes, Congress limited the suspension period because the "carriers contended that any postponement of rate changes would result in loss of revenue or competitive advantages fairly due them in the interim if the rates were finally determined to be lawful." *Arrow*, 372 U.S. at 664-65. Congress made this decision with full knowledge that "some shippers might for a time have to pay unlawful rates because a [suspension] proceeding might not be concluded and an order made within the reduced time." *Id.* at 665.[14]

The legislative history of the exception clause of §11702(a)(4) reinforces the conclusion that the Act deprives courts of the power to enjoin rates that the ICC has failed to suspend, reject, or cancel. That exception clause formerly appeared in §222(b) of the Motor Carrier Act of 1935, 49 Stat. 543, 564. Shortly after the enactment of this provision, a district court ruled that it had jurisdiction to compel a carrier to adhere to its filed rate, but that the exception clause deprived the court of power "to determine a complaint that the rates, fares or charges established by a motor carrier were unreasonable or were discriminatory." *ICC v. Overnight Motor Transp.*, 24 F. Supp. 751, 752 (E.D. Pa. 1938). Further, a transportation expert commented at the time that, by reason of the exception clause in §222(b), "the discriminatory or unreasonable character of rates, fares or charges would have to be determined and lawful rates, fares or charges prescribed by order [of the ICC] before the matter would come within the jurisdiction of the courts." *Mohundro's Notes on Motor Carrier Act, 1935* 389 (C.B. Guthrie Tariff Bureau, Inc., 1935). In contrast, here the ICC seeks an injunction that forces a carrier to *depart* from its duly filed rate even though

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[14] After a carrier's rate takes effect, shippers may obtain reparations under §11705(b)(3) if the ICC thereafter determines the tariff rate to be unlawful (*Reiter*, 122 L.Ed.2d at 616). The ICC, not a court, must make that determination. *See id.*

the ICC admits that: "We don't contend the tariff violated anything." Resp. App. 2a.

VI. *COMMERCIAL METALS* DOES NOT SUPPORT THE ICC'S VIEW THAT THE GENERAL PROVISIONS OF §§10743(b) AND 11702(a)(4) CREATE EXCEPTIONS TO THE "UTTERLY CENTRAL" FILED RATE DOCTRINE OF §§10761-62

The ICC argues that *Commercial Metals*, which this Court decided prior to *Maislin*, supports the ICC's right to an injunction that would prevent the Trustee from enforcing Transcon's loss-of-discount tariff provision. But the Seventh Circuit precedent that the Court cited in *Commercial Metals*, and the Court's reasoning in that case, compel the opposite conclusion. Instead, *Commercial Metals* shows the primacy of the filed rate requirements of §§10761-62 over the credit regulations.

A. *Commercial Metal*'s Reasoning Conflicts with the ICC's Position That the Filed Rate Doctrine Is Subordinate to the ICC's Power To Regulate Credit and To Obtain Injunctions

Although the ICC relies upon *Commercial Metals*, that case did not involve any attempt by the ICC to enforce its credit regulations in a manner that contravened §§10761-62. The ICC was not a party and had not issued its 1988 decision that authorized loss-of-discount tariffs. The parties were a carrier and a shipper. The shipper sought to assert the carrier's violation of the ICC's credit regulations as a defense to enforcement of the carrier's filed rate claim. In rejecting the shipper's defense, the Court stated that a "carrier has not only the right but also the *duty* to recover its proper charges" under the Court's filed rate doctrine precedent. 456 U.S. at 343 (emphasis added). The Court reaffirmed the primacy of the filed rate doctrine:

> We therefore hold that the Court of Appeals erred by permitting [the shipper] to assert an affirmative defense against [the carrier] based on its violation

> of the ICC credit regulations. Such 'equities' as may exist by virtue of the carrier's delay and its violation of the credit regulations are insufficient in magnitude to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) [will] estop or preclude it from enforcing payment of the full amount by a person liable therefor." *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, 265 U.S. at 65[.]

Commercial Metals, 456 U.S. at 352. This ruling implicitly holds that a carrier's violation of the ICC's credit regulations does *not* operate to suspend, reject, or cancel the carrier's filed rate. By implicitly finding that the carrier's filed rate remains in effect despite the carrier's violations of the credit regulations, and by affirming the carrier's duty to collect its filed rate notwithstanding any violation of the credit regulations, *Commercial Metals* fails to support the view that a carrier that violates the ICC's credit regulations no longer has either the right or duty to enforce the filed rate.

B. The Seventh Circuit Precedent Cited in *Commercial Metals* Shows That the Injunction Sought by the ICC against the Trustee Is Inconsistent with the Court's Decision

Commercial Metals cites a Seventh Circuit case to illustrate the Court's statement that the ICC has the power to bring an injunction to enforce its credit regulations. The Seventh Circuit case cited by the Court is *ICC v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974). *See Commercial Metals*, 456 U.S. at 349. The injunction in *All-American* is very different from the injunction that the ICC seeks against the Trustee. Here is *All-American's* description of the injunction sought by the ICC:

> This action was instituted in the district court by the appellant Interstate Commerce Commission . . . seeking to enjoin appellee All-American . . . from extending credit to shippers who it knows, or should

> know, *will not pay its tariff charges* within a seven day period from the date of presentation of the freight bill in violation of [the Act] and [the ICC's credit regulations.] The Commission further sought to prevent All-American from providing credit until it had taken precautions *sufficient to assure payment of its tariff charges* within such seven day period as required by the [credit regulations].

All-American, 505 F.2d at 1361-62 (emphasis added). This quotation describes the kind of injunction that the Court intended to approve in *Commercial Metals*: an injunction that compels the carrier to comply with its filed rate and the duty to collect tariff charges, not an injunction that prevents collection of the filed rate. In contrast to *All-American*, the ICC here seeks an injunction to prevent the Trustee from collecting Transcon's filed rate. The ICC admitted this to the district court. *See supra* part I.A, pp. 16-17.

VII. THE ICC'S ARGUMENT THAT IT "COULD" STRIKE TRANSCON'S TARIFF IS BOTH IRRELEVANT AND MISTAKEN

The ICC suggests in a footnote that the ICC's credit regulations can be used to prevent enforcement of Transcon's duly filed rate because the "ICC could strike the tariff from its files (and could, in certain circumstances, retroactively reject it)[.]" Govt. Brief 25 n.20.

This argument assumes that Transcon's loss-of-discount tariff provision is unlawful. But the ICC conceded that the tariff was lawful. *See supra* part I.A, pp. 17-18. Further, it is not a defense to enforcement of a filed tariff rate that the tariff is technically defective or that the rate specified in the tariff is unreasonable. "Under our cases, neither procedural irregularity nor unreasonableness nullifies a filed rate; the shipper's remedy for irregularity or unreasonable rates is damages." *KMart*, 128 L.Ed.2d at 444, *citing Berwind-White Coal Mining Co. v. Chicago & Erie R. Co.*, 235 U.S. 371 (1914), and *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *see also KMart*, 128 L.Ed.2d at 444 n.8, *citing Texas &*

Pacific R. Co. v. Cisco Oil Mill, 204 U.S. 449 (1907) (tariff rates filed with ICC and delivered to freight officers of railroad are legally operative despite railroad's failure to post two copies in each railroad depot) and *Genstar Chemical Ltd. v. ICC,* 665 F.2d 1304, 1309 (D.C. Cir. 1981) ("[T]he 'error' in the tariff was certainly not apparent on its face"), *cert. denied,* 456 U.S. 905 (1982).

It is unlikely that the ICC would have taken a three year journey to this Court if it "could" so readily strike Transcon's loss-of-discount tariff provision. In fact, the ICC can not effectively strike Transcon's loss-of-discount tariff. In *ATA*, this Court held that the ICC's power to reject a tariff under §10762(e) does not include the power "to nullify effective tariffs retroactively." *ATA*, 467 U.S. at 361-62. Thus, if the ICC ordered Transcon's loss-of-discount tariff provision cancelled, that cancellation would not retroactively relieve shippers of their liability for the past-due tariff charges that the Trustee seeks to recover for Transcon's past transportation services.

To give shippers blanket relief from the Trustee's enforcement of Transcon's loss-of-discount tariff as applied to past transportation services, the ICC would have to "retroactively reject" that tariff provision under *ATA*, 467 U.S. 354. But, as stated, the ICC concededly has not done so (Govt. Brief 25 n.20), and conceded before the Ninth Circuit that Transcon's loss-of-discount tariff was lawful (Resp. App. 1a-2a). Under *ATA*, retroactive rejection is only justified if it satisfies two criteria: "first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate." *ATA*, 467 U.S. at 367. Here, the ICC would be seeking to exercise its narrow retroactive rejection power for the purpose of preventing enforcement of the filed rate doctrine in order to implement the non-specific provisions of §§10743(b) and 11702(a)(4). Yet, as noted *supra* parts IV-V, pp. 26-37, §10743(b) does not allow credit regulations to be used as a device to prevent the collection of the filed rate, and §11702(a)(4) contains a specific exception to the ICC's injunctive powers that prevents their use when the ICC, under

the guise of preventing discrimination, seeks to enjoin the collection of a duly filed and effective rate that has never been suspended, rejected, or cancelled.

As a result, the Trustee is entitled to enforce Transcon's loss-of-discount tariff provision, subject only to the shipper's right to challenge the reasonableness of Transcon's filed rate at the ICC. However, before the ICC can rule on the reasonableness of Transcon's filed rate (1) a shipper must assert a claim (or counterclaim) in a civil action for reparations under §11705(b)(3), and (2) the court must stay and "refer" the reparations claim to the ICC to allow the ICC to determine the reasonableness of the rate and, if the ICC finds the rate to be unreasonable, to set the reasonable rate from which the court awards the shipper damages. *See ATA*, 467 U.S. at 361 n.5; *Reiter*, 122 L.Ed.2d at 618; *KMart*, 128 L.Ed.2d at 444.

VIII. THE ICC'S BROAD READING OF FOOTNOTE 11 OF *MAISLIN* IS MISTAKEN

The ICC concludes its brief by characterizing its injunctive action as within the scope of footnote 11 of *Maislin*. Govt. Brief 26-27. In footnote 11, the Court stated that:

> None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice have required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff. . . . (*Maislin*, 497 U.S. at 129 n.11.)

Citing footnote 11, the ICC insists that the injunction sought by the ICC complies with the filed rate doctrine in that the injunction would merely require the Trustee to adhere to Transcon's filed discount rate, and would not require the Trustee to depart altogether from Transcon's filed tariff rate.

The ICC's broad reading of footnote 11 contradicts the ICC's own interpretation of the filed rate doctrine when, in 1988, the ICC first specifically authorized loss-of-discount tariffs. *See Ex Parte No. MC-1: Regulations for Payment of Rates and Charges – Penalty Charges for Nonpayment*, 4

I.C.C.2d 340 (1988). As previously noted *supra* part I.A, pp. 15-16, the ICC has stated:

> Under a tariff-rule method of recoupment, at the expiration of the grace period, a carrier *must* affirmatively seek the collection-charge damages due it as provided in the tariff. A carrier has no discretion after the charges become due to waive them or any portion of them. To do so would violate the "filed rate" doctrine applicable to its tariff and unjustly discriminate between other shippers and/or consignees who do not have such fees waived. (*Id.* at 346-47 (emphasis in original).)

There are additional flaws in the ICC's reading of footnote 11. In effect, the ICC argues that the filed rate doctrine permits the ICC to adopt regulations that require a carrier to adhere to an inapplicable tariff as a penalty for violating the ICC's credit regulations. This argument conflicts with the position that the ICC took before the district court, namely that the loss-of-discount tariff provision was a part of Transcon's filed rate within the meaning of *Maislin*. *See supra* part I.A, pp. 16-17.

The ICC's argument leads to absurd results. It would, for example, permit the ICC to adopt a regulation that provides that carriers seeking to recover undercharges shall be limited to the originally billed charges so long as those charges are the same as some otherwise inapplicable, but filed, tariff rate (e.g., a billed rate for a truckload of steel girders would be acceptable if it happened to be the same as the carrier's filed rate for a truckload of feathers). Under the ICC's logic, that regulation would be valid since it would not require a departure "altogether" from the carrier's filed rate. However, this Court has never held that a carrier complies with the filed rate doctrine when it enforces an inapplicable tariff rate. In this case, the ICC *conceded* that Transcon's loss-of-discount tariff provision was a part of Transcon's "filed rate" within the meaning of *Maislin*. Pet. App. 30a, 57a-58a; *see supra* part I.A, pp. 16-18. Further, the loss-of-discount tariff provision unambiguously provides that discount rates apply "only" to

shippers that pay "tariff charges" within 90 days of the shipment. Pet. App. 18a; *see supra* part B, pp. 5-6. The possibilities of discrimination and favoritism would be enormous if the filed rate doctrine permitted the carrier to give discount rates that are conditioned on payment within 90 days to favored customers that pay after 90 days.[15]

Further, none of the cases cited in footnote 11 of *Maislin*, when read in light of that decision, permit the ICC to compel a carrier to adhere to an inapplicable tariff:

1. In *Adams v. Mills*, 286 U.S. 397 (1932), this Court upheld an ICC order that reparations be paid to shippers who were improperly charged a 25 cent fee by various railroads for the unloading of livestock from rail cars. The 25 cent fee was not contained in the railroad's tariff, but was contained in a terminal agent's tariff that had been filed at the ICC, but not "joined in" by the railroads. The ICC had found that the transportation service provided by the railroads included "all services performed in connection with the shipment up to and including the placing of the stock in the pens of the commissionmen." 286 U.S. at 413-14. Since the fee was not part of the railroads' filed tariffs and their filed tariffs included all charges for the unloading of the livestock, the ICC found that it was an unreasonable practice for the railroads to pass through to the shippers the charges of the railroads' agents who actually performed the unloading. In contrast to *Adams*, here Transcon's filed rate unquestionably included the loss-of-discount tariff provision for shippers who paid after 90

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[15] For this reason, there is no merit to the argument of *amici* Health and Personal Care etc., et al. at page 13 of their brief that this case is "akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the [filed rate doctrine]." In the "double-payment" cases, the consignee pays the full filed rate, but pays it to the wrong person. *See Commercial Metals*, 456 U.S. at 347. Here, the Trustee seeks to collect filed rate charges from shippers who clearly failed to pay in full the only applicable filed rate, *i.e.*, the rate that applied to shippers that paid more than 90 days late.

days. There is no attempt to collect a rate in addition to Transcon's filed rate.

2. In *Hewitt-Robbins v. Eastern Freight-Ways*, 371 U.S. 84 (1962), this Court held that a shipper had a common law right to require that a carrier transport its freight over the cheapest available route absent justification for not so doing. The Court did not permit the shipper to disregard or to depart from the tariff rate for the more expensive route, but merely permitted the shipper to assert an independent claim for damages against the carrier for misrouting the shipment in breach of its duties as a common carrier. *Hewitt-Robbins* found that the dispute "is not one of rates but of routes[,]" 371 U.S. at 87, and that the "savings" clause of the Act allowed the common law rights and remedies to survive. In contrast, here the ICC impermissibly attempts to enjoin application of the duly filed and applicable rate without setting aside or suspending that rate as unreasonable.

3. The other cases cited in footnote 11 of *Maislin* consist of circuit court and ICC precedent "in which the ICC has determined that a carrier engaged in an unreasonable practice by requiring a certain notation attached to the bill of lading to qualify the shipper for a reduced tariff . . . . " *Maislin*, 497 U.S. at 129 n.11; *see Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989); *Standard Brands, Inc. v. Central R. Co. of New Jersey*, 350 I.C.C. 555 (1974). These cases have dubious merit because they were all decided prior to *Maislin*. Further, in reviewing the ICC's pre-*Maislin* practice of selectively ignoring portions of tariffs, the circuit court in *Carriers Traffic* noted that: (1) all of the cases before the circuit court had been referred by the district court to the ICC for its review (881 F.2d at 476-78), and (2) the ICC did *not* excuse compliance with the carrier's filed tariff rate on the ground that "we've always ignored that tariff requirement," (881 F.2d at 484-85), but because the shippers had in fact done everything, other than put a notation on a bill of lading, required to entitle the shipper to the tariff rate (*id.*). In contrast, here there is no allegation that shippers substantially fulfilled the condition precedent to obtaining the

discount (i.e., paying the tariff charge within 90 days). Moreover, the ICC has no general power to award reparations unless the shipper first obtains referral of the issue to the ICC from a district court. *See Reiter*, 122 L.Ed.2d at 618, *citing Ex Parte No. 249 (Sub-No. 1): Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403 (1969). Under *Ex Parte No. 249* as approved in *Reiter*, the ICC has no right to enjoin collection of undercharge claims that have never been referred to the ICC.

IX. THE ICC RETAINS BROAD POWER TO REGULATE CREDIT

The Ninth Circuit correctly described as "overblown" the ICC's argument that the circuit court opinion cripples the ICC's enforcement powers. Pet. App. 7a.

Sustaining the Trustee's position will not deprive the ICC of significant enforcement power. The Trustee does not dispute that the ICC has authority to regulate credit under §10743(b) and to obtain injunctions under §11702(a)(4). The ICC remains free to promulgate and enforce any regulatory scheme within reason, so long as it does not operate to preclude a carrier from enforcing its duly filed and effective filed rate. The ICC could even enjoin carriers prospectively to refrain from extending credit to shippers without reminding them of their liability for loss-of-discount tariff charges, and the ICC could further obtain injunctions directing carriers to vigorously enforce their loss-of-discount provisions. *See, e.g., Ex Parte No. 73: Regulations for Payment of Rates and Charges*, 326 ICC 483, 490 (1966) ("we do have the power to prohibit carriers from extending credit to shippers who owe past due charges"). What the ICC cannot do is promulgate or enforce credit regulations that prevent carriers from collecting their duly filed and effective tariff rate.

The ICC also retains the power under *Reiter*, upon referral from the district court, to determine reparations under §11705(b)(3) to the extent that a carrier's loss-of-discount provision is unlawful. Further, under §10704(f), the ICC could begin a proceeding to prospectively cancel under

§10704(b)(2) all loss-of-discount tariffs and to prescribe the new rule to be followed. *See ATA*, 467 U.S. at 360 (under §10704(b)(1), ICC may set the rate to "apply in the future").

The ICC mentions its "lack[ ] of resources" to police tariff filings. Govt. Brief 25 n.20. Congress, not the Court, must solve any funding problem that the ICC may have. In any event, lack of funds does not permit an agency to violate its statutory mandate. Further, the ICC's problems in policing tariffs are at least partly self-inflicted. Even though an underlying policy of the filed rate doctrine is "stabilizing rates," *Maislin*, 497 U.S. at 126, and even though §10708(b) permits the ICC to suspend tariff filings for up to seven months (as a result of the 1927 Newton amendment (*see supra* part V.B, pp. 34-37)), the ICC since 1984 has maintained a policy that permits tariff filings to take effect on one day's notice. *Ex Parte No. MC-170: Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146 (1984). In adopting this policy, the ICC rejected the argument that "any substantial reduction in notice requirements will effectively eliminate the ability to protest tariff filings." *Id.* at 151-58. *See Maislin*, 497 U.S. at 134 n.14 (listing the ICC's various tariff policies).

X. THE TRUSTEE HAS STANDING TO CHALLENGE THE ICC'S CREDIT REGULATIONS

The Court should reject any argument that the Trustee lacks standing to challenge the ICC's credit regulations. The ICC has previously lost the argument that regulations adopted by it cannot be later challenged. The ICC lost that argument in *State of Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985). There, the Fifth Circuit held:

> When an agency applies a previously adopted rule in a particular case, the Hobbs Act sixty-day limit does not bar later judicial review of the substantive statutory authority for their enactment or of their applicability to a particular situation.

Id. at 1146; *see Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)

(allowing an attack on FCC rules three years after their promulgation).

Further, even in actions by the Government to obtain a statutory injunction, the "grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Id.* The ICC should not be permitted to invoke the equitable jurisdiction of this Court to enforce credit regulations that violate the Act.

XI. THE ICC CONCEDES THAT THE NEGOTIATED RATES ACT OF 1993 DOES NOT ADDRESS THE ISSUE PRESENTED BY THE PETITION

The ICC's certiorari petition concedes that: "The Negotiated Rates Act, however, does not address the issue in this case[.]" Pet. 18 n.12. Under Rule 24.1 of this Court, the ICC is foreclosed from now taking a different position, especially when its opening brief on the merits did not do so.[16]

The ICC declined to present this issue for review, because the Negotiated Rates Act of 1993 did not amend §§10743(b) and 11702(a)(4). Instead, the legislative history of the 1993 amendments reflects that the ICC tried, but failed, to get Congress to amend §10743(b) to say what the ICC insists that provision already says. During the hearings on the proposed 1993 amendments, the Chair of the ICC unsuccessfully urged Congress to amend §10743(b) to read as follows:

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[16] The Trustee has litigation pending that challenges the scope and effect of the Negotiated Rates Act of 1993, and the Government is a participant as *amicus* in that litigation. *See In re Transcon Lines*, 9th Cir. No. 94-55425. The Trustee has not briefed here the issues raised in that litigation. As stated, by reason of the Government's concession in its certiorari petition, those issues are not before this Court at this time.

> . . . . The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers, *and may prescribe permissible terms and conditions for late payment provisions which carriers may apply only if they adhere to those terms and conditions notwithstanding any contrary or conflicting provisions which may be contained in the carrier's tariffs on file with the Commission.*

Hearing on Negotiated Rates Issue and Proposed Legislative Solutions Thereto before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 103rd Cong., 1st Sess. 353-54 (1993) (statement of ICC Chair Gail McDonald) (emphasis in original).

The limited, specific exceptions to the filed rate doctrine made by the 1993 amendments reinforce the wisdom of the Court's view that Congress must use specific language to create an exception to the filed rate doctrine of §§10761-62. As stated, the 1993 amendments did not amend §§10743(b) and 11702(a)(4).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 2, 1994

APPENDIX OF STATUTORY PROVISIONS

Text of the Newton Amendment §§ 1-2, Pub.L.No. 69-804, 69th Cong., 2d. Sess., 44 Stat. 1446 (1927)

CHAP. 510. – An Act To amend the Interstate Commerce Act and the Transportation Act, 1920, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (1) of section 22 of the Interstate Commerce Act, as amended be amended by adding at the end thereof the following new sentence; "Nothing in this Act shall prevent any carrier or carriers subject to this Act from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the commission (with or without a hearing); but in any such order the commission shall define such section and shall specify the period during which such reduced rates are to remain in effect."

That paragraph (2) of section 3 of the Interstate Commerce Act, as amended, is amended to read as follows:

"(2) No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be

construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within

the period provided in paragraph (3) of section 16. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16."

SEC. 2. Paragraph (7) of section 15 of the Interstate Commerce Act, as amended, is amended to read as follows:

"(7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, as once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a

longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

* * *

Title 49, United States Code

§ 10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

* * *

(b)(1) When the Commission decides that a rate charged or collected by –

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

(B) a water common carrier for providing transportation subject to its jurisdiction under subchapter III of chapter 105 of this title; or

(C) a freight forwarder for providing service subject to its jurisdiction under subchapter IV of chapter 105 of this title;

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2)(A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

(B) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier or motor carrier of property, the Commission shall consider, among other factors, the need for revenues that are sufficient, under honest, economical, and efficient management, to let the carrier provide that transportation or service.

* * *

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be in extension of a complaint pending before the Commission. A complaint under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

§ 10708. Investigation and suspension of new nonrail carrier rates, classifications, rules, and practices

(a)(1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately, on its own initiative or on application of an interested party when –

(A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier, under this subtitle; or

(B) a new or reduced rate or rule or practice that causes a reduction of a rate is filed with the Commission by a contract carrier under this subtitle.

(2) The Commission must give reasonable notice before beginning a proceeding under this section but may act without allowing an interested carrier to file an answer or other formal pleading in response to its decision to begin the proceeding. The Commission may take whatever final action on a rate, classification, rule, or practice under this section, after a full hearing (whether completed before or after the rate, classification, rule, or practices goes into effect), as it could in a proceeding begun after a rate, classification, rule, or practice became effective.

(c) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect by (1) delivering to each affected carrier, and (2) filing with the proposed rate, classification, rule, or practice, a statement of reasons for the suspension. If the Commission does not take final action during the suspension period, the proposed rate, classification, rule, or practice is effective at the end of that period. However, if an increase in a rate for, or related to, transportation of property by an express, sleeping car, or pipeline carrier becomes effective under this subsection, the Commission may require the interested carrier to account for all amounts received under it and specify by whom and on whose behalf those amounts were paid. When the Commission takes final

action, it may require the carrier to refund, with interest, to the persons on whose behalf those amounts were paid, the part of the increased rate found to be in violation of this subtitle.

(c) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall give proceedings under this section preference over all other proceedings related to that type of carrier pending before it and make its decision at the earliest practical time. . . .

§ 10743. Payment of rates

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.

(b)(1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service. The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers.

(2) Such a carrier (including a motor common carrier being used by a household goods freight forwarder) may extend credit for transporting property for the United States Government, a State, a territory or possession of the United States, or a political subdivision of any of them.

§ 10744. Liability for payment of rates

(a)(1) Liability for payment of rates for transportation for a shipment of property by a shipper or consignor to a consignee other than the shipper or consignor, is determined under this subsection when the transportation is provided by a rail, motor, or water common carrier under this subtitle. When the shipper or consignor instructs the carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property –

(A) of the agency and absence of beneficial title; and

(B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

(2) When the consignee is liable only for rates billed at the time of delivery under paragraph (1) of this subsection, the shipper or consignor, or, if the property is reconsigned or diverted, the beneficial owner, is liable for those additional rates regardless of the bill of the lading or contract under which the property was transported. The beneficial owner is liable for all rates when the property is reconsigned or diverted by an agent but is refused or abandoned at its ultimate destination if the agent gave the carrier in the reconsignment or diversion order a notice of agency and the name and address of the beneficial owner. A consignee giving the carrier, and a reconsignor or diverter giving a rail carrier, erroneous information about the identity of the beneficial owner of the property is liable for the additional rates. . . .

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device. . . .

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a

household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly –

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties

to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is

published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change resulting in a reduced rate applicable to special or charter transportation shall not become effective for 10 days after the notice is published.

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept

open for public inspection. However, the Commission shall require that all rates of rail carriers and rail ratemaking associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section. . . .

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action –

(1) to enjoin a rail carrier from violating section 10901-10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;

(2) to enforce section 10527 or 10930 or 11109 or 11111 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchapter;

(3) to enforce an order of the Commission, except a civil action to enforce an order for the payment of money,

when it is violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title;

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a foreign motor carrier or foreign motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title;

(5) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle, except a civil action to enforce an order for the payment of money, when violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title; and

(6) to enforce this subtitle, or a regulation or order of the Commission or permit issued under this subtitle when violated by a carrier providing service subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title. . . .

§ 11706. Limitation on actions by and against common carriers

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder must begin a civil action to recover charges for transportation or service provided by the carrier or freight forwarder within 3 years after the claim accrues; except that a motor carrier (other than a motor carrier providing transportation of household goods) or freight forwarder (other than a household goods freight forwarder)–

(1) must begin such a civil action within 2 years after the claim accrues if the transportation or service is provided by the carrier in the 1-year period beginning on the date of the enactment of the Negotiated Rates Act of 1993; and

(2) must begin such a civil action within 18 months after the claim accrues if the transportation or service is provided by the carrier after the last day of such 1-year period. . . .

§ 11902. Civil penalty for accepting rebates from common carrier

A person (1) delivering property to a common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title for transportation under this subtitle or for whom that carrier will transport the property as consignor or consignee for that person from a State or

territory or possession of the United States to another State or possession, territory, or to a foreign country, and (2) knowingly accepting or receiving by any means a rebate or offset against the rate for transportation for, or service of, that property contained in a tariff filed with the Commission under subchapter IV of chapter 107 of this title, is liable to the United States Government for a civil penalty in an amount equal to 3 times the amount of money that person accepted or received as a rebate or offset and 3 times the value of other consideration accepted or received as a rebate or offset. In a civil action under this section, all money or other consideration received by the person during a period of 6 years before an action is brought under this section may be included in determining the amount of the penalty, and if that total amount is included, the penalty shall be 3 times that total amount.

§ 11903. Rate, discrimination, and tariff violations

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(b) A carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or an officer, director, receiver, trustee,

lessee, agent, or employee of a corporation that is subject to the jurisdiction of the Commission under that chapter, that willfully does not file and publish its rates or tariffs as required under chapter 107 of this title or observe those tariffs until changed under law, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

(c) When acting in the scope of their employment, the actions and omissions of persons acting for or employed by a carrier or shipper that is subject to subsection (a) or (b) of this section are considered to be the actions and omissions of that carrier or shipper as well as that person.

(d) Trial in a criminal action under this section is in the judicial district in which any part of the violation is committed or through which the transportation is conducted.

§ 11916. Conclusiveness of rates in certain prosecutions

When a carrier files with the Interstate Commerce Commission or publishes a particular rate under chapter 107 of this title or participates in one of those rates, the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections. . . .

* * *

Title 49, Code of Federal Regulations

PART 1320 – REGULATIONS FOR THE PUBLICATION, POSTING AND FILING OF TARIFFS, SCHEDULES AND RELATED DOCUMENTS

Sec.

1312.1 Introduction and general provisions.

1312.2 Applications for special tariff authority.

1312.3 Size of paper and where to send tariff publications and other documents.

1312.4 Filing tariffs.

1312.5 Posting requirements.

1312.6 Furnishing copies of tariff publications.

1312.7 Form and printing.

1312.8 ICC tariff designations.

1312.9 Codes for identification of places.

1312.10 Powers of attorney, concurrences, transfer of agent. [See also § 1312.4(d)]

1312.11 Tariffs issued by joint agents not applicable to contract carriers or freight forwarders.

1312.12 Title page of original tariffs.

1312.13 Contents of tariffs.

1312.14 Statement of rates and fares.

1312.15 Routing not applicable to freight forwarder or contract carriers.

1312.16 Sectional tariffs.

1312.17 Amendments.

1312.18 Supplements.

1312.19 Cancellation of tariff and transfer of provisions.

1312.20 Transfer of operations – change in name and control.

1312.21 Suspended matter.

1312.22 Rates or other provisions prescribed by the Commission.

1312.23 Expiration dates.

1312.24 Tariffs listing carriers' operating authority applicable to motor carriers of property.

1312.25 Participating carrier tariffs.

1312.26 Rate basis tariffs.

1312.27 Classification, exceptions, rules, dangerous articles and station list tariffs.

1312.28 Accessorial, terminal and other services.

1312.29 Rates and liability based on value provisions.

1312.30 Distance rates.

1312.31 Commodity rates determined by the use of rate base numbers.

1312.32 Application of rates from or to intermediate points.

1312.33 Class rates from or to unnamed points applicable only to motor carriers of property.

1312.34 Continuous service rates not applicable to passenger carriers.

1312.35 Time-volume rates not applicable to passenger carriers.

1312.36 Seasonal water rates.

1312.37 Export and import traffic and joint rates with ocean carriers.

1312.38 Substitution of service.

1312.39 Miscellaneous provisions which may be filed on less than statutory notice.

1312.40 Claims rules.

AUTHORITY: 49 U.S.C. 10321 and 10762; 5 U.S.C. 553

SOURCE: 49 FR 38615, Oct. 1, 1984, unless otherwise noted.

EFFECTIVE DATE NOTE: At 54 FR 6404, Feb. 10, 1989, part 1312 was removed, effective March 13, 1989. At 54 FR 10533, Mar. 13, 1989, ICC issued a document to stay the effective date of this rule, effective March 10, 1989.

At 54 FR 42959, Oct. 19, 1989, a partial lifting of stay was published, effective November 8, 1989, for rail carriers only. . . .

§ 1312.14 Statement of rates and fares.

(a) *Shall be clear and explicit.* (1) Rates, fares, and provisions shall be clearly stated and arranged in a systematic manner which establishes the rate, charge or

attendant provisions for each service offered or performed by the serving carrier. Rates and charges shall be explicitly stated per unit in U.S. dollars or cents. A rate for a given service may be expressed as a definite percentage of another explicitly stated rate in the same or other tariffs. The disposition of fractions and other tariff elements required to determine the applicable rate, charge or provision shall be clearly explained. Tariffs of motor passenger contract carriers shall provide an explicit statement of the minimum rates, fares, or charges actually maintained. Rates may be stated in any measurable unit. Rates may be stated as applying e.g., per car, per vehicle, per mile, per vehicle-mile, per container, per package, per passenger, per unit of time or other variable unit, provided the measure of the service is fixed by defining the unit specifically, or in maximum terms, such as a stated maximum weight of contents permitted per vehicle or container of a certain maximum cubic capacity or measurement, or stated maximum dimensions or weight per individual package. Rates for rail, water, and motor passenger service (including one-way, roundtrip, commutation, etc.) may be stated per passenger or other identifiable unit. Rates based on quantity shall be stated as having any quantity, less-than-truckload, truckload, less-than-carload, carload, trainload, volume or any other clearly defined quantity application. . . .

[49 FR 38615, Oct. 1, 1984, as amended at 50 FR 459, Jan. 4, 1985]

§ 1312.19 Cancellation of tariff and transfer of provisions.

(a) *Cancellation of an entire tariff.* (1) Except as provided in paragraph (a)(4) of this section, a tariff shall be canceled by issuing a supplement. The supplement shall –

(i) State on its title page that it cancels the tariff;

(ii) Refer by ICC designation to the tariff(s), if any, which applies in place of the canceled provisions; and

(iii) Identify provisions being transferred (not discontinued) and the tariffs to which they are being transferred. . . .

§ 1312.21 Suspended matter.

(a) *Effect of suspension.* When the Commission suspends one or more rate(s), provision(s), or publication(s), that suspended matter is postponed until the suspension period runs out.

(b) *Supplement required.* A supplement announcing the suspension shall be filed to the involved tariff(s). Two methods of publishing may be used. One is to issue a separate supplement for each suspension proceeding; the other is to issue a consolidated suspension supplement which contains notices of all suspension proceedings involving the tariff. Only one consolidated supplement to a tariff may be in effect at one time. The title page of either type of supplement shall –

(1) Identify the Commission's suspension docket number;

(2) Show an issue date but not an effective date; and

(3) Comply with the requirements governing tariff amendments, except as otherwise provided in this section.

(c) *Content of supplement.* The supplement shall:

(1) Identify the rates, provisions or publications which have been suspended;

(2) State that those rates, provisions or publications are "under suspension and may not be used until [here show either the date to which the matter has been suspended, or a later date, or state "this suspension notice is canceled"]";

(3) Identify the rates, provisions or publications that will apply in place of the suspended matter;

(4) Correct by statement any cancellations which would have the effect of canceling the suspended matter or the matter held in force; and

(5) Correct the listing of effective supplements on previous supplements' title pages. . . .

PART 1320 – EXTENSION OF CREDIT TO SHIPPERS BY RAIL COMMON CARRIERS, MOTOR COMMON CARRIERS, WATER COMMON CARRIERS, AND HOUSEHOLD GOODS FREIGHT FORWARDERS

Sec.

§ 1320.1 Scope.

1320.2 Extension of credit to shippers.

1320.3 Presentation of freight bills.

1320.4 Effect of mailing freight bills or payments.

1320.5 Additional charges.

1320.6 Computation of time.

1320.7 Charges under average demurrage agreements.

1320.8 Household goods shipments by motor common carriers.

1320.9-1320.16 [Reserved]

1320.17 Interline settlement of revenues.

AUTHORITY: 5 U.S.C. 553 and 49 U.S.C. 10321, 10701, 10702, 10741, 10743, and 10744.

SOURCE: 50 FR 2290, Jan. 16, 1985, unless otherwise noted.

§ 1320.1 Scope.

(a) *General.* These regulations apply to the extension of credit in the transportation of property under Interstate Commerce Commission regulation by rail, motor,

and water carriers and household goods freight forwarders, except as otherwise provided.

(b) *Exceptions.* These regulations do not apply to –

(1) Contract carriage operations.

(2) Transportation for –

(i) The United States or any department, bureau, or agency thereof,

(ii) Any state, or political subdivision thereof,

(iii) The District of Columbia.

(3) Property transportation incidental to passenger operations.

[50 FR 2290, Jan. 16, 1985, as amended at 51 FR 44297, Dec. 9, 1986]

§ 1320.2 Extension of credit to shippers.

(a) *Authorization to extend credit.* (1) A carrier that meets the requirements in paragraph (a)(2) of this section may –

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called *shippers* in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified –

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) *When the credit period begins.* The credit period shall begin on the day following presentation of the freight bill.

(c) *Length of credit period.* Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) *Carriers may establish different credit periods in tariff rules.* Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

(e) *Service charges.* (1) Service charges shall not apply when credit is extended and payments are made within the standard credit period. The term *standard credit period*, as used in the preceding sentence, means –

(i) The credit period prescribed in paragraph (c) of this section, or

(ii) A substitute credit period published in a tariff rule pursuant to the authorization in paragraph (d) of this section.

(2) Carriers may, by tariff rule, extend credit for an additional time period, subject if they wish to a service charge for that additional time. The combined length of the carrier's standard credit period (as defined in paragraph (e)(1) of this section) and its additional credit

period shall not exceed the 30-day maximum credit period prescribed in paragraph (d) of this section. When such a tariff rule is in effect, shippers may elect to postpone payment until the end of the extended credit period if, in consideration therefor, they include any published service charges when making their payment.

(3) Carriers may, by tariff rule, establish service charges for payments made after the expiration of an authorized credit period. Such a rule shall –

(i) Institute such charges on the day following the last day of an authorized credit period, and

(ii) Notify shippers –

(A) That its only purpose is to prevent a shipper who does not pay on time from having free use of funds due to the carrier;

(B) That it does not sanction payment delays, and

(C) That failure to pay within the authorized credit period will, despite this provision for such charges, continue to require the carrier, before again extending credit, to determine in good faith whether the shipper will comply with the credit regulations in the future.

(4) Tariff rules that establish charges pursuant to paragraph (e)(2) or (3) of this section may establish minimum charges.

(f) *Discounts.* Carriers may, by tariff rule, authorize discounts for early freight bill payments when credit is extended.

(g)(1) *Collection expense charges.* Carriers may, by tariff rule, assess reasonable and certain liquidated damages

for all costs incurred in the collection of overdue freight charges. Carriers may use one of two methods in their tariffs:

(i) The first method is to assess liquidated damages as a separate additional charge to the unpaid freight bill. In doing so, the tariff rule shall disclose the exact amount of the charges by stating either a dollar or specified percentage amount (or a combination of both) of the unpaid freight bill. The tariff shall further specify the time period (which shall at least allow for the authorized credit period) within which the shipper must pay to avoid such liquidated damages.

(ii) The second method is to require payment of the full, nondiscounted rate instead of the discounted rate otherwise applicable. The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort. Under this method the tariff shall identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain. The date certain may not be set to occur by the carrier until at least after the expiration of the carrier's authorized credit period.

(2) The damages, the timing of their applicability, and the conditions, if any, as provided by the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section also:

(i) Shall be clearly described in the tariff rule;

(ii) Shall be applied without unlawful prejudice and/or unjust discrimination between similarly situated shippers and/or consignees;

(iii) Shall be applied only to the non-payment of original, separate and independent freight bills and shall not apply to aggregate *balance-due* claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent;

(iv) Shall not apply to instances of clear clerical or ministerial error such as non-receipt of a carrier's freight bill, or shipper's payment check lost in the mail, or carrier mailing of the freight bill to the wrong address;

(v) Shall not apply in any way to a charge for a transportation service if the carrier's bill of lading independently provides that the shipper is liable for fees incurred by the carrier in the collection of freight charges on that same transportation service;

(vi) Shall be applied only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period.

(3) As an alternative to the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section, a carrier may, wholly outside of its tariff, assess collection charges though [*sic*] contract terms in a bill of lading. By using the carrier and its bill of lading, the shipper accepts the bill of lading terms.

(h) *Discrimination prohibited.* Tariff rules published pursuant to paragraphs (a), (e), and (f) of this section shall not result in unreasonable discrimination among shippers.

[50 FR 2290, Jan. 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

§ 1320.3 Presentation of freight bills.

(a) *"To be prepaid" shipments.* (1) On "to be prepaid" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (a)(2) of this section, except –

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the carrier received the shipment. This time period does not include Saturdays, Sundays, or legal holidays.

(b) *"Collect" shipments.* (1) On "collect" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (b)(2) and of this section, except –

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the shipment was delivered at its destination. This time period does not include Saturdays, Sundays, or legal holidays.

(c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge*

and/or collection expense charge and discount terms. When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penalties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and any applicable service charge and/or collection expense charge and discount terms.

(d) *When the carrier lacks sufficient information to compute tariff charges.* (1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its freight bill for payment within 7 days following the day upon which sufficient information becomes available at the billing point. This time period does not include Saturdays, Sundays, or legal holidays.

(2) A carrier shall not extend further credit to any shipper which fails to furnish sufficient information to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier.

(3) As used in this paragraph, the term "shipper" includes, but is not limited to, freight forwarders, and shippers' associations and shippers' agents within the meaning of 49 U.S.C. 10562(3) and (4).

(e) *Freight bill presentation on railroad transported export traffic loaded into vessels.* The term *delivered at its destination* as used in paragraph (b)(2) of this section shall mean the time when the vessel is completely loaded, when –

(1) The traffic in export traffic that is loaded into vessels either –

(i) Direct from railroad cars or piers, or

(ii) From such cars or pirers [*sic*] by means of lighters, and

(2) The freight bills are presented to vessel owners or their representatives.

[50 FR 2290, Jan. 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

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(12)

No. 93-1318

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In the Supreme Court of the United States

OCTOBER TERM, 1994

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Arrow Transp. Co. v. *Southern Ry.*, 372 U.S. 658 (1963) 13
Batterton v. *Francis*, 432 U.S. 416 (1977) 4
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 4
Ex parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Non-payment, 4 I.C.C.2d 340 (1988) 1, 3
Ex parte 73: In re Section 3 of Interstate Commerce Act As Amended February 28, 1920, & March 4, 1927, 171 I.C.C. 268 (1931) 13
ICC v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) 14
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) 2, 6, 7, 8
MCI Telecommunications Corp. v. *American Telephone & Telegraph Co.*, No. 93-356 (June 17, 1994) 9
Reiter v. *Cooper*, 113 S. Ct. 1213 (1993) 2, 6, 8
Security Services, Inc. v. *KMart Corp.*, 114 S. Ct. 1702 (1994) 2, 5, 7
Southern Pacific Transp. Co. v. *Commercial Metals Co.*, 456 U.S. 336 (1982) 7, 11-12, 14
United States v. *Morton*, 467 U.S. 822 (1984) 4
Yakus v. *United States*, 321 U.S. 414 (1944) 4

Statutes and regulations:

Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* 3
Motor Carrier Act of 1935, ch. 498, § 223, 49 Stat. 565-566 12
Transportation Act of 1920, ch. 91, § 405, 41 Stat. 479 12
Truth in Lending Act, 15 U.S.C. 1601 *et seq.*:
15 U.S.C. 1601(a) 6
15 U.S.C. 1638(a) 6
15 U.S.C. 1638(a)(10) 6

Statutes and regulations—Continued: Page

49 U.S.C. 10743 ..... 4, 6, 8, 9, 11
49 U.S.C. 10743(b) (1) 5, 10, 13
49 U.S.C. 10761-10762 ..... 3, 4
49 U.S.C. 10761 2
49 U.S.C. 10762 ..... 2, 7
49 U.S.C. 11701 16
49 U.S.C. 11702 ..... 9, 13, 14, 16
49 U.S.C. 11702(a) (4) 13
49 U.S.C. 11902-11903 ..... 11, 15, 16
49 U.S.C. 11916 ..... 15, 16
44 Stat. 1447 (1927) 12
49 C.F.R.:
Section 1117.1 16
Section 1320.2(g) (1) 3
Section 1320.2(g) (1) (ii) 3
Section 1320.2(g) (2) (i) 7
Section 1320.2(g) (3) 7

Miscellaneous:

H.R. Rep. No. 1214, 69th Cong., 1st Sess. (1926) .. 12
S. Rep. No. 1508, 69th Cong., 2d Sess. (1927) 12

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REPLY BRIEF FOR THE PETITIONER

Respondents contend that both the ICC's credit regulations and the injunction the agency seeks in this case violate the filed rate doctrine. Resp. Br. 12, 22-25. Relying on Transcon's placement of its credit terms in a filed tariff (Br. 21) and citing (Br. 16) a statement of the Commission that the filed rate doctrine requires a carrier to make efforts to collect credit charges due under its tariff,[1] respondents ar-

[1] See *Ex parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 4 I.C.C.2d 340, 346-347 (1988) ("[T]he 'filed rate' doctrine" would be violated if a carrier failed "affirmatively [to] seek the collection-charge damages due it as provided in the tariff."). That statement recognizes a carrier's obligation to pursue collection charges without discrimination between shippers.

gue that the ICC cannot obtain an injunction against their admitted breach of ICC regulations governing the imposition of collection charges. Respondents' contention that its tariff is paramount over both the statute and the regulations in that manner rests on a misunderstanding of the credit regulations, the purpose and effect of the ICC's requested injunction, and the scope and limitations of the filed rate doctrine. The filed rate doctrine does not preclude the ICC from exercising its statutory authority to obtain an injunction enforcing requirements under the Interstate Commerce Act and its implementing regulations, including the Commission's expressly authorized credit regulations.

1. *The ICC's credit regulations do not violate the filed rate doctrine.* Respondents repeatedly invoke (Br. 15, 19-20, 22-25, 26) the filed rate doctrine in claiming that they may violate the ICC's credit regulations with impunity. Yet the filed-rate provisions of the Act apply only to a "rate" or "rates" for "transportation or service." 49 U.S.C. 10761 and 10762.[2] The charges at issue in this case are not tariff "rates for transportation." The only charges at issue here are liquidated damages, whose purpose is to compensate the carrier for the costs of collection

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Respondents apparently read that statement as suggesting that, even in the face of the ICC's request for an injunction, carriers are entitled to pursue collection-charge damages without complying with ICC regulations. Resp. Br. 15-16, 41-42. The Commission has never made such a statement.

[2] Sections 10761 and 10762 are the provisions that have given rise to the filed rate doctrine. *Security Services, Inc.* v. *KMart Corp.*, 114 S. Ct. 1702, 1706 (1994), citing *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 127 (1990), and *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993).

from late-paying shippers.[3] While these additional charges are described in Transcon's tariff, as provided by ICC regulations,[4] they are also governed by the additional requirements set forth in the ICC's credit regulations.

Contrary to respondents' claim (Br. 22-25), the credit regulations do not violate the filed rate doctrine.[5] The ICC's credit regulations, promulgated

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[3] Respondents' amicus Lloyd T. Whitaker recognizes this. See Amicus Br. 12 ("The liquidated damages are intended to make carriers whole for all their reasonable collection costs."). The ICC has never sought to enjoin respondents from collecting the "rates for transportation" (49 U.S.C. 10761-10762) that were due within the authorized credit period. Nor has the ICC sought to prevent respondents from collecting interest from any late-paying shippers. See Pet. Br. 17, 27.

[4] The credit regulations permit a carrier, "by tariff rule, [to] assess *reasonable and certain liquidated damages* for all costs incurred in the collection of overdue freight charges," 49 C.F.R. 1320.2(g)(1) (emphasis added). The ICC's regulations also state that one permissible way to measure "reasonable and certain liquidated damages" in a tariff filing

> is to require payment of the full, nondiscounted rate instead of the discounted rate otherwise applicable. *The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort.*

49 C.F.R. 1320.2(g)(1)(ii) (emphasis added). Transcon's tariff implements that provision to the letter. See Pet. Br. 6 n.7.

[5] The credit regulations were promulgated in 1988, see *Ex parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 4 I.C.C.2d 340 (1988), and respondents did not challenge those regulations within the 60-day time limit under the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* Nor did the court of appeals hold that the ICC regulations are invalid. In view

pursuant to the express grant of power in Section 10743, are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *United States* v. *Morton*, 467 U.S. 822, 834 (1984) ("Because Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute."); *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977). Respondents do not suggest that the regulations are arbitrary or capricious; their only claim is that they conflict with the filed rate doctrine.

The filed rate doctrine, however, does not constitute the only source of requirements that carriers must meet under the Act. The credit regulations draw on a source of power that is independent of the filed-rate provisions of the Act, and they address a subject matter that is not covered by those provisions. The filed-rate provisions, 49 U.S.C. 10761-10762, address shipping rates; the credit provision, 49 U.S.C. 10743, addresses release of goods without prior payment. In particular, the credit regulations at issue here deal solely with liquidated damages for late payment. That subject is not governed solely, or even principally, by standards that the Act imposes on the filing and collection of shipping rates; rather, the Act expressly

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of the longstanding reliance of the industry on these regulations and respondents' failure to mount a timely challenge, this Court should decline to entertain respondents' collateral attack in this enforcement proceeding. Cf. *Yakus* v. *United States*, 321 U.S. 414, 427-448 (1944). In any event, respondents' claim lacks merit.

makes credit transactions subject to the ICC's regulations.[6]

For that reason, respondents err in contending (Br. 22-23) that the ICC is barred by the filed rate doctrine from requiring carriers to give notice to shippers, above and beyond the constructive notice provided by the tariff, that shippers are exposed to collection charges for late payment. The Act does not itself speak to the issue of whether carriers may be required to give notice to shippers of liquidated damages claims. And, in view of the heavy financial consequences of such claims, the ICC reasonably concluded that the notice required under its credit regulations serves valid purposes for shippers.[7] While shippers are charged with constructive notice of tariff charges, *Security Services, Inc.* v. *KMart Corp.*, 114 S. Ct. 1702, 1710 (1994), the filed rate doctrine does not prevent the ICC from prescribing by regulation

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[6] Section 10743 states that only if the ICC promulgates "regulations * * * governing the payment for transportation and service and preventing discrimination" may a carrier "give up possession at destination of property transported * * * before payment." 49 U.S.C. 10743(b)(1).

[7] In light of the prevailing levels of discount rates in the industry during the relevant time, a loss-of-discount measure of liquidated damages often doubles the original charges. Additional notice of potential charges of that magnitude is plainly reasonable. Also reasonable is the ICC's prohibition against the imposition of loss-of-discount collection charges in aggregate balance due claims. A carrier realizes substantial economies of scale in collecting grouped claims; if a loss-of-discount measure of damages were applied to such groupings, it would reap far more than the carrier's fair compensation for its collection costs.

that liquidated damages claims warrant actual notice as well.[8]

It would be especially inappropriate to apply the filed rate doctrine to invalidate the credit regulations, because the core of that doctrine is that "a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate." *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). Respondents' claim (Br. 22) that the credit regulations violate the filed rate doctrine rests on their view that the credit regulations create "a defense to * * * enforcement" of the tariff rate.[9] In fact, the credit regulations do not create defenses that are enforceable at the behest of

[8] Amicus Lloyd T. Whitaker argues (Br. 12) that the "liquidated damages regulation has nothing to do with fixing the conditions under which carriers may extend credit to shippers," and that it is therefore not a credit regulation under Section 10743. But a regulation that addresses the consequences of late payment in a credit transaction *is* a regulation of credit. See, *e.g.*, the Truth in Lending Act, which mandates "a meaningful disclosure of credit terms," 15 U.S.C. 1601(a), and requires a creditor in certain "consumer credit transaction[s]," 15 U.S.C. 1638(a), to disclose, *inter alia*, "[a]ny dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment, other than a deferral or extension charge." 15 U.S.C. 1638(a)(10).

[9] See Resp. Br. 22 (ICC's regulations make "the carrier's misquotation of the loss-of-discount tariff provision, or the shipper's lack of notice of that tariff provision, a defense to its enforcement"); *ibid.* (ICC's regulations "make the carrier's failure to send bills in separate envelopes, or in a timely manner, a defense to payment of the rate specified in Transcon's loss-of-discount tariff").

shippers. See *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982). The credit regulations are enforceable solely *by the ICC*.

Maislin, the leading case on which respondents rely (Br. 22-25), offers no support to them. *Maislin* holds that the ICC cannot "justify[] deviation from the filed rate purely on the ground that the carrier and shipper have privately negotiated a lower rate." 497 U.S. at 131; *Security Services, Inc.* v. *KMart Corp.*, 114 S. Ct. at 1708 ("We held in *Maislin*, *supra*, that the [filed rate] requirement was not subject to discretionary enforcement when raised against a shipper who had agreed with a carrier to a negotiated rate lower than the rate on file."). The credit regulations at issue here do not make a privately negotiated rate take precedence over a tariff.[10] They simply require that a tariff term providing for liquidated damages must be enforced in light of the ICC's integrated regulatory scheme for conducting transactions on credit.

[10] Nor are the portions of the credit regulations that permit a carrier "wholly outside of its tariff, [to] assess collection charges through contract terms in a bill of lading," 49 C.F.R. 1320.2(g)(3), vulnerable under *Maislin* on the theory that they "sanction[] adherence to unfiled rates." Resp. Br. 23, quoting *Maislin*, 492 U.S. at 132. The bill-of-lading option underscores that the "collection charges" authorized by the ICC's credit regulations are not "rates * * * for transportation" under 49 U.S.C. 10762. But even if the bill-of-lading approach raised questions under *Maislin*, it would not assist respondents. The ICC is not seeking to require respondents to adhere to a bill of lading. Rather, the ICC is seeking to require respondents to adhere to the credit regulations governing the imposition of collection charges "described in [a] tariff rule," 49 C.F.R. 1320.2(g)(2)(i).

The ICC's injunction would leave shippers bound to pay the filed rate for transportation due within the authorized credit period plus interest to compensate for late payment. *Maislin* itself distinguished cases in which, as a remedy for an unreasonable practice, a carrier is required to adhere to a different tariff. 497 U.S. at 129 n.11. This case is even stronger than those cases, because the requirement being enforced is not the general "reasonable practices" requirement, but the specific statutory rule against unauthorized credit transactions.[11] If, as respondents contend, the filed rate doctrine overrode their obligation to comply with those regulations when seeking to enforce liquidated damages claims, a carrier could effectively define its own credit terms through its tariff filings, notwithstanding the statutory prohibition against credit transactions except as authorized by ICC regulations. 49 U.S.C. 10743.

2. *The injunction requested by the ICC does not violate the filed rate doctrine.* Respondents also claim (Br. 26-37) that the injunction sought by the ICC is invalid because it would prevent collection of the filed rate. Respondents appear to recognize (Br. 26-27), as this Court held in *Reiter* v. *Cooper*, *supra*, that "[t]he filed rate doctrine * * * does *not* preclude avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." 113 S. Ct. at

[11] Contrary to respondents' assertion (Br. 41-42), the ICC is not claiming the right to apply some unrelated filed tariff as a remedy for respondents' violations. Rather, the ICC's remedy is precisely tailored to the violations at issue: because respondents have violated specific regulations governing collection of liquidated damages, they may not collect liquidated damages.

1219. They assert, however, that the ICC cannot prevent them from collecting liquidated damages set forth in a tariff, because 49 U.S.C. 10743 and 11702 do not contain "specific statutory language or legislative history that shows a specific congressional intention to create the exception [to the filed rate doctrine]." Resp. Br. 27. Contrary to respondents' claim, the ICC's invocation of its express authority in 49 U.S.C. 11702 to "bring a civil action * * * to enforce" its credit regulations under Section 10743 is sufficient to overcome their reliance on the filed rate doctrine.

a. Respondents first assert (Br. 28-29) that Section 10743 is a "minor grant of authority" and is not a specific exception to the filed rate doctrine. As shown above, however, Section 10743 and the filed-rate provisions of the Act address different subjects. The statute does not subordinate one set of requirements to the other. And, contrary to respondents' suggestion (Br. 29), *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, No. 93-356 (June 17, 1994), does not suggest that filed-rate requirements always prevail over all other forms of statutory authority. That case holds that the provision in the Federal Communications Act authorizing the FCC to "modify any requirement" of the tariff-filing provision of that Act did not authorize the FCC to dispense with tariff filings altogether for certain carriers. *MCI*, slip op. 7-14. That analysis has no bearing on the relationship between the Interstate Commerce Act's filed-rate requirements and its authorization for the ICC to regulate credit transactions.[12]

[12] *MCI* is also irrelevant here, because the applicable ICC regulations do not dispense with tariff filings for loss-of-

Noting that the only specific authority mentioned in Section 10743 is that the ICC may permit "weekly or monthly payment for transportation," [13] respondents argue that the credit regulations are relatively unimportant and cannot override the " 'utterly central' requirements" of the filed rate doctrine. Resp. Br. 28. The Act, however, grants broad authority to the Commission to issue credit regulations "governing the payment for transportation and service," so long as the ICC's regulations "prevent[] discrimination," 49 U.S.C. 10743(b)(1). The ICC's regulations are consistent with that anti-discrimination mandate. A carrier's uniform compliance with the ICC's regulations prevents discrimination, because similarly situated shippers receive the same treatment.[14] When a

---

discount liquidated damages. Rather, they treat a tariff filing as one requirement a carrier must meet to impose such damages. Pet. Br. 3-5.

[13] The full sentence states: "The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers." 49 U.S.C. 10743(b)(1). The point of that sentence is to distinguish the Commission's powers with respect to motor carriers and water carriers. There is no suggestion that the sentence defines the boundaries or character of permissible credit regulations.

[14] Amicus Lloyd T. Whitaker errs in suggesting (Br. 8-9) that the Commission's rules in practice foster discrimination because they "impose[] highly technical post-delivery requirements on the motor carriers as conditions to collecting their filed rate penalties." The rules are not highly technical; for example, it is easy for a carrier to provide the requisite notice of late payment. And carriers have no discretion to violate the regulations and favor particular shippers in the imposition of liquidated damages. Any such knowing favoritism would

carrier violates those rules, however, it cannot rely on the anti-discrimination requirement of Section 10743, or the filed rate doctrine, to make an end-run around the ICC's credit regulations.

Amicus International Brotherhood of Teamsters asserts (Br. 7) that "if the Commission's arguments prevail and Transcon's loss of discount provisions are voided, discrimination would occur because all shippers utilizing Transcon's services would receive the discounted rates, regardless of when the freight charges were paid." But shippers who are victims of regulatory violations by Transcon and its bankruptcy trustee (and who have been assessed, years after shipment, with huge loss-of-discount claims) are not similarly situated to shippers who were rebilled in compliance with the regulations. Treating differently situated shippers differently does not result in discrimination. Moreover, to the extent a shipper has not paid the amount originally billed, it will be required to pay that amount with interest. Interest both compensates the carrier for loss of use of its money and ensures that delinquent shippers do not enjoy an advantage over shippers who make timely payment.

The legislative history of the Act does not support respondents' claim (Br. 31-37) that the purpose of Section 10743 was "to facilitate * * * compliance with the filed rate doctrine" (Br. 31). The central purpose of empowering the Commission to regulate credit was to prevent discrimination in credit practices. As this Court explained in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. at

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expose the carrier to a governmental enforcement action. 49 U.S.C. 11902-11903.

345-346, before 1918, the federal government did not regulate the extension of credit by rail carriers. "Wartime regulation revealed, however, that a general requirement of payment before delivery would protect the working capital of carriers and avoid discrimination among credit recipients." *Id.* at 346. After the end of the war, railroads returned to private control, and Congress prohibited them from releasing freight before payment "except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination." Transportation Act of 1920, ch. 91, § 405, Stat. 479.[15]

In light of that history, respondents err (Br. 31-32) in claiming that the source of the ICC's authority to regulate credit was the 1927 "Newton Amendment." The Newton amendment substituted the phrase "govern the settlement" for the words "assure prompt payment" in the original credit provision, see 44 Stat. 1447 (1927). It responded to the suggestion by shippers that the Commission needed additional authority to expand the credit periods in its then-current rules so that shippers could study their freight bills and compare them with tariff rates. See H.R. Rep. No. 1214, 69th Cong., 1st Sess. 2 (1926); S. Rep. No. 1508, 69th Cong., 2d Sess. 2 (1927). As the Commission explained, "[t]he only change in the law made by the amendment is that now we are not restricted to making rules that assure prompt payment of freight charges." *Ex parte 73: In re Section 3 of Interstate Commerce Act As Amended February 28, 1920, and March 4, 1927*, 171 I.C.C. 268, 270 (1931). The amendment did not change the main purpose of empowering the Commission to regulate credit: to "prevent[] discrimination" against shippers. 49 U.S.C. 10743(b)(1).

[15] Congress's authorization to the Commission to regulate credit was applied to motor carriers when they came under Commission jurisdiction in 1935. See Motor Carrier Act of 1935, ch. 498, § 223, 49 Stat. 565-566.

b. The injunction in this case was sought under 49 U.S.C. 11702. Under *Reiter* v. *Cooper*, that express right of action trumps the filed rate doctrine. Pet. Br. 17-21. Respondents argue (Br. 30-31) that the ICC's authority to seek an injunction is inapplicable in this case because Section 11702 does not extend to enforcement of "a provision of this subtitle governing the reasonableness and discriminatory character of rates." 49 U.S.C. 11702(a)(4). Respondents do not argue that Section 10743, the credit provision, is a provision "governing the reasonableness and discriminatory character of rates." Instead, they suggest that application of Section 11702 in this case would violate the principle that a federal court may not "enjoin tariff rates that the ICC has neither suspended, rejected, nor cancelled." Resp. Br. 30; see *id.* at 34-37.

The ICC's injunction, however, would not suspend, reject, or cancel Transcon's tariff.[16] Indeed, if Transcon were an operating carrier, it would be required in future transactions with shippers to comply both with its tariff terms (see note 1, *supra*) *and* with

[16] Respondents' reliance (Br. 34-37) on *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), is thus misplaced. That case involved a request by a private party for injunctive relief against a change in rates. This case involves a request by the ICC for injunctive relief to enforce credit regulations.

the ICC's credit regulations.[17] The only consequence of the ICC's injunction is to prohibit respondents from enforcing the tariff without complying with the ICC's regulations. Section 11702 expressly authorizes the ICC to seek such an injunction.

c. In *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. at 349, this Court stated that the ICC's authority includes the "power to seek a federal-court injunction requiring a carrier to comply with the [ICC's credit] regulations." Despite this language, respondents contend (Br. 37-39) that *Commercial Metals* mandates the denial of an ICC-requested injunction that would prevent a carrier from enforcing a tariff term. *Commercial Metals* held that *a shipper* may not raise a credit-regulation violation to defend against the carrier's effort to collect the filed rate. 456 U.S. at 352. An integral part of the Court's reasoning was that the ICC possessed adequate remedial authority to require adherence to the credit regulations, including the power to seek an injunction. *Id.* at 349, 352; Pet. Br. 15-16. *Commercial Metals* thus holds that the ICC may invoke its authority to compel adherence to the credit regulations, even though shippers may not. Where, as here, the ICC does not seek to enjoin collection of rates for transportation, but only a carrier's claim to collect liquidated damages for late payment in violation of the ICC's regulations, *Commercial Metals* clearly supports the ICC's action.

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[17] The tariff on its face is not illegal. Contrary to respondents' suggestion (Br. 39-41), however, the ICC could strike a tariff term if there were evidence that a carrier were engaged in serious violations of the Act in enforcing that tariff term. See *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) (the ICC may strike a facially valid tariff, even retroactively in some circumstances, based on conduct related to the tariff that violates other provisions of the Act).

3. *The ICC's injunction is necessary to enforce the credit regulations.* If the ICC were not entitled to obtain the requested injunction in this case, respondents would effectively be immune from any regulatory action for their violations. Respondents claim (Br. 45-46) that the ICC may obtain prospective injunctions, or may prospectively cancel all loss-of-discount tariffs. Those remedies, however, would have no impact at all on nonoperating carriers such as Transcon and its bankruptcy trustees. Respondents also suggest (Br. 45) that a shipper could request a referral to the ICC to determine reparations "to the extent that a carrier's loss-of-discount provision is unlawful." But Transcon's tariff is not unlawful. Rather, the unlawful act is respondents' pattern of violating the ICC's credit regulations governing liquidated damages claims.

Respondents note (Br. 25) that Section 11916 of the Interstate Commerce Act makes the filed rate "conclusive proof" of the "legal rate" in specified civil or criminal enforcement proceedings (see 49 U.S.C. 11902-11903) brought by the government to enforce the anti-rebate provisions of the Act. 49 U.S.C. 11916.[18] According to respondents, Section 11916 thus requires them to collect the non-discount rate in this case, while the ICC "under its credit regulations, wants to take the position that Transcon

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[18] That provision states: "When a carrier files with the Interstate Commerce Commission or publishes a particular rate under chapter 107 of this title or participates in one of those rates, the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections." 49 U.S.C. 11916.

has a legal duty to refrain from collecting that filed rate." Br. 25.

That contention turns the Act on its head. Section 11916, by its terms, applies only to actions by the government to enforce the anti-rebate provisions of the Act, 49 U.S.C. 11902-11903. To the extent that shippers failed to make timely payment, respondents were obligated to impose Transcon's loss-of-discount penalty *within the framework of the ICC's rules*. Having failed to do so, respondents are exposed to the remedies at the agency's disposal for violating ICC regulations. If respondents desired guidance concerning whether, notwithstanding their violation of those regulations, they were entitled to collect liquidated damages from late-paying shippers, their remedy was to institute an appropriate proceeding before the Commission. See 49 U.S.C. 11701; 49 C.F.R. 1117.1. The dilemma that respondents now claim to face is entirely of their own making; it does not justify denial to the ICC of its explicit power to enforce the requirements of the Act and its implementing regulations through an injunction. 49 U.S.C. 11702.

* * * * *

For the foregoing reasons, as well as the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FOR ARGUMENT

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

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Pursuant to Rule 25.5 of this Court, Respondents submit this supplemental brief to add a citation in response to the argument of Petitioner that appears in footnote 5 at page 3 of Petitioner's reply brief, dated August 1994.

That footnote 5 cites the Administrative Orders Review Act, 28 U.S.C. §2341 *et seq.* (the "Hobbs Act"). Petitioner did not cite the Hobbs Act in Petitioner's certiorari petition or in Petitioner's opening brief on the merits.

In response to Petitioner's citation to the Hobbs Act, Respondents submit the following supplemental authority: *Plum Run Service Corp. v. United States (In re Plum Run Service Corp.)*, 167 B.R. 460, 464-65 (Bankr. S.D. Ohio 1994) (discussing effect of 28 U.S.C. §1334(b) on a statute that is analogous to 28 U.S.C. §2342). This supplemental authority appeared in the July 20, 1994 supplement to West's Bankruptcy Reporter, after the filing of our Respondents' brief on the merits.

The *Plum Run* case supplements the following citations that already appear in our Respondents' brief on the merits: (1) *Gumport, Trustee v. ICC (In re Transcon Lines)*, 147 B.R. 770 (Bankr. C.D. Cal. 1992) (cited at page 10 of our brief and rejecting, at 147 B.R. 774, the Hobbs Act

argument of the ICC), and (2) the additional citation at Part X, page 46 of our brief (rejecting the Hobbs Act argument of the ICC on an alternative ground).

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SUPPLEMENTAL BRIEF

Respondents submit this brief under Rule 25.5 of the Supreme Court Rules to notify this Court of intervening new matter that discusses the recently enacted legislation ("TIRRA") referred to in Petitioner's voluminous filing under letter dated October 31, 1994, the day before oral argument. That intervening new matter, which discusses TIRRA, is Petitioner's Policy Statement on the Transportation Industry and Regulatory Reform Act of 1994, Ex Parte No. MC-222, 10 I.C.C.2d 251 (October 24, 1994) (the "ICC Policy Statement"). The ICC Policy Statement explains that collectively made bureau tariffs will nevertheless continue to apply under the filed-rate doctrine, even after TIRRA repeals the filed-rate doctrine for motor

common carriers of property. ICC Policy Statement, 10 I.C.C.2d 252-54. That point is relevant for two reasons:

1. During oral argument, the Court asked one or more questions about the function of a bureau tariff, which is the kind of tariff that Respondent Trustee contends he must enforce under the terms of Transcon's loss-of-discount tariff provision in Transcon's rules tariff (Item 210 of Transcon's TCON 103 tariff). The ICC Policy Statement reflects that, even after Congress prospectively repealed the filed-rate doctrine on a limited basis for motor common carriers. Congress decided that bureau tariffs would remain a part of the "filed rate" of participating motor common carriers.

2. During oral argument, Respondents' counsel of record indicated to the Court that Transcon's loss-of-discount tariff provision, which operates to require late-paying shippers to pay the bureau tariff rates, could be characterized as "liquidated damages" as opposed to a "rate." That assertion was inaccurate in that: (a) as reflected by the ICC Policy Statement, even under TIRRA, bureau tariff rates will continue to be a part of a participating motor common carrier's "filed rate"; and (b) the imposition of the bureau rates for late paying shippers is a "rate" for "transportation" and "service" as defined in 49 U.S.C. §§ 10102(26)(A)-(B) and 10761 as it represents the carrier's tariff based charge for the "transportation"

of the freight for, and the subsequent "service" of having to collect the freight charge from, delinquent shippers.

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BRIEF OF *AMICUS CURIAE* THE TRANSPORTATION CLAIMS & PREVENTION COUNCIL IN SUPPORT OF PETITIONER THE INTERSTATE COMMERCE COMMISSION

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QUESTION PRESENTED

Whether a carrier can penalize a shipper for late payment of freight charges, when the carrier fails to comply with the Interstate Commerce Commission's regulations governing carriers' extension of credit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
I. THE PROCEEDINGS BELOW	2
II. THE REGULATORY SCHEME	3
III. THIS CASE	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. THE I.C.C. EXERCISES ITS PLENARY AUTHORITY REGULATING A CARRIER'S EXTENSION OF CREDIT	7
A. The I.C.A. Restricts Common Carriers' Extension of Credit to Shippers	7
B. The I.C.C.'s Regulations Allow Liquidated Damages, Not an Undercharge Liability	8
II. TRANSCON'S COMPLIANCE WITH THE I.C.C.'S CREDIT REGULATIONS IS A CONDITION PRECEDENT TO TRANSCON'S ENFORCEMENT OF ITS LOSS OF DISCOUNT TARIFF PROVISION	9
A. The I.C.C.'s Credit Regulations Require Actual Notice to Shippers of Transcon's Loss of Discount Provision	10
III. THE FILED RATE DOCTRINE IS NOT ABSOLUTE	13

TABLE OF CONTENTS – Continued

	Page
A. *Maislin* and Its Progeny Limit the Filed Rate Doctrine	13
B. This Court's Decision in *Security Services v. Kmart* Requires Deference to the I.C.C.'s Credit Regulations	14
C. Only the I.C.C. May Enforce Its Credit Regulations	18
1. This Court's Precedents Seek Balance Between Carriers and the I.C.C.	20
CONCLUSION	22

TABLE OF AUTHORITIES

Page

COURT DECISIONS

Brizendine v. Cotter & Company, 4 F.3d 457 (7th Cir. 1993), *pet. for cert. granted, judgment vacated and remanded*, 62 U.S.L.W. 3503 (U.S. May 23, 1994) (No. 93-1129) 17

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 8

Delta Traffic Service, Inc. v. The Mennen Company, 730 F. Supp. 1309 (D. N.J. 1990), *aff'd*, 919 F.2d 134 (3rd Cir. 1990) 9

I.C.C. v. American Trucking Associations, Inc., 467 U.S. 354 (1984) 20, 21

I.C.C. v. Transcon Lines, 990 F.2d 1503 (9th Cir. 1993), *pet. for cert. granted, judgment vacated and remanded*, 113 S. Ct. 2955 (June 14, 1993), 9 F.3d 64 (9th Cir. 1993) 2, 3, 12, 15, 21

Louisville & Nashville Railway Co. v. Maxwell, 237 U.S. 94 (1915) 2

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 2, 12, 13, 19

Overland Express, Inc. v. I.C.C., 996 F.2d 356 (D.C. Cir. 1993), *pet. for cert. granted, judgment vacated and remanded*, 62 U.S.L.W. 3420 (U.S. May 23, 1994) (No. 93-883) 17

Reiter v. Cooper, 113 S. Ct. 1213 (March 8, 1993) 2, 3, 13, 14, 19

Security Services, Inc. f/k/a Riss International Corp. v. Kmart Corp., 93-284, ___ S. Ct. ___, 1994 WL 183598 (May 16, 1994) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982) 18, 19, 20, 21, 22

Udall v. Tallman, 380 U.S. 1 (1965) 8

ADMINISTRATIVE DECISIONS

The Mennen Company v. Campbell 66 Express, Inc. et al., No. MC-C- 30135, 1989 WL 239321 (Sept. 6, 1989) 9

STATUTES

49 U.S.C. § 10743(a) 7

49 U.S.C. § 10743(b)(1) 3, 7

REGULATIONS

49 C.F.R. § 1320 3

49 C.F.R. § 1320.2(a)(2) 9

49 C.F.R. § 1320.2(e)(3) 9

49 C.F.R. § 1320.2(g) 9

49 C.F.R. § 1320.2(g)(1) 4, 8, 10

49 C.F.R. § 1320.2(g)(2) 4, 10, 11, 19

49 C.F.R. § 1320.3(c) 4, 9, 11

MISCELLANEOUS CITATIONS

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) 16

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BRIEF OF *AMICUS CURIAE* THE TRANSPORTATION CLAIMS & PREVENTION COUNCIL IN SUPPORT OF PETITIONER THE INTERSTATE COMMERCE COMMISSION

INTEREST OF AMICUS CURIAE[1]

The Transportation Claims and Prevention Council, Inc. ("TCPC") is a voluntary, not for profit organization of approximately 650 firms nationwide. TCPC's primary purpose is to represent shipper interests in transportation claim issues, such as the undercharge claims by carriers' Trustees against shippers. TCPC has sponsored numerous

[1] Both parties to this case have consented to the filing of this brief.

Joint Defense Groups to assist its members in obtaining a cost-effective defense against these claims. Some of these Joint Defense Groups involved undercharges based on loss of discount for late payment of freight charges, namely, claims filed by the trustees for Transcon Lines, P*I*E Nationwide, Friedman's Express, St. Johnsbury Trucking and others. Thus. millions of dollars in undercharge claims are at stake.

TCPC, therefore, has a direct interest in the issues presented herein. It supports the position of the Interstate Commerce Commission and the United States of America.

SUMMARY OF THE CASE

I. The Proceedings Below

This case forms the latest installment in a series of recent decisions reviewed by this Court involving the "filed rate doctrine" first announced in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915), and more recently revisited in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), *Reiter v. Cooper*, 113 S. Ct. 1213 (1993), and *Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598 (May 16, 1994). This is also the second review of this case by this Court. On June 14, 1993, this Court vacated the decision of the Ninth Circuit in *I.C.C. v. Transcon Lines*, 990 F.2d 1503 (1993), remanding it with instructions to reconsider its decision in light of *Reiter v. Cooper*. The Ninth Circuit Court of Appeals apparently declined to change its opinion, stating:

> It is not necessary in this case to decide whether the ICC's reading – that *Reiter* applies not only to the claims of shippers but also to the claims of the ICC – is correct. For even if it is, the Commission has failed to demonstrate that our decision in *Transcon* was wrong.

I.C.C. v. Transcon Lines, 9 F.3d 64 (1993), Pet. at 5a. The decision below is erroneous because it ignores a specific statutory directive from Congress to the I.C.C. (49 U.S.C. § 10743(b)(1)) and falls within the exception to the filed rate doctrine reiterated in *Reiter v. Cooper*.

II. The Regulatory Scheme

The Interstate Commerce Act ("I.C.A.") requires that a carrier receive full payment of freight charges prior to releasing the goods to the shipper or consignee. However, the I.C.A. allows a carrier to release goods without full payment of the freight charges *if its does so pursuant to I.C.C. regulations*. 49 U.S.C. § 10743(b)(1). Pursuant thereto, the Commission promulgated 49 C.F.R. § 1320 setting forth the conditions under which the carriers may penalize shippers for paying freight charges later than a carrier's credit terms. Pet. Appendix H at 80a. Transcon failed to comply with these conditions, and therefore, is precluded from assessing the penalties sought in its actions against its former customers.

III. This Case

Transcon was a motor common carrier with operating authority from the Interstate Commerce Commission. It filed tariffs with the I.C.C. containing nondiscounted

class rates and discounts off those rates. Transcon's tariff also contained a so-called "loss of discount" provision in the rules section of its tariff. The "loss of discount" provision was authorized by the I.C.C.'s regulations governing a carrier's extension of credit. The credit regulations allow Transcon to assess a penalty to a shipper who paid the freight bill late. 49 C.F.R. § 1320.2(g)(1)(i) and (ii). Under the I.C.C.'s regulations, a carrier may either assess liquidated damages (a sum certain or percentage of the freight charges) or require the shipper to pay the nondiscounted tariff rate (i.e., the difference between the discounted and the nondiscounted rates constituting the carrier's liquidated damages) to compensate it for the additional administrative expense of collecting freight charges. 49 C.F.R. § 1320.2(g)(1)(i) and (ii). Transcon chose the latter method. However, the regulations mandate that the carrier give notice on each freight bill that failure to pay freight charges within the carrier's credit period may subject the shipper to penalties. 49 C.F.R. § 1320.3(c). Transcon failed to place said warning on its freight bills. Transcon also failed to file its claims in accordance with the procedures specified in the Commission's regulations. 49 C.F.R. § 1320.2(g)(2)(iii) (the damages shall be applied only to the original, separate, and independent freight bills, not to aggregate balance due bills by bankruptcy trustees) and 49 C.F.R. § 1320.2(g)(2)(iv) (balance dues must be issued within 90 days after expiration of the credit period).

Transcon elicited traffic from shippers by filing discounts in its tariff. When Transcon delivered the shipments, the shipper paid the freight charges on the freight bills without knowledge of Transcon's loss of discount

tariff provision. The freight bills did not contain a notice about the payment period or loss of discount tariff provision for untimely payment, as required by the I.C.C.'s regulation. Transcon accepted the shipper's late payment without demand for the undiscounted rate as liquidated damages. Only after Transcon went bankrupt did the Trustee seize upon the carrier's loss of discount tariff provision to collect more money from Transcon's former customers.

SUMMARY OF THE ARGUMENT

The Interstate Commerce Act permits common carriers to extend credit to shippers, but only when they comply with I.C.C. regulations governing their extension of credit. In creating a "gap" in the statute regarding the extension of credit, Congress specifically authorized the I.C.C. to promulgate regulations. Since the I.C.C.'s regulations are the result of a Congressional directive, the I.C.C. is acting at the zenith of its authority and its regulations should be accorded great deference by the courts. The I.C.C.'s regulations are a self-help remedy which allow the carrier to collect liquidated damages from a shipper who pays freight charges late. However, the regulations set forth caveats for carriers enforcing their tariff's credit rules. Transcon violated those regulations in several significant ways: 1) it did not show the credit period on the freight bill; 2) it did not place a warning about the loss of discount for untimely payment on the original freight bill; 3) it did not issue a revised invoice assessing the undiscounted rate within ninety days of the credit period's expiration; and 4) Transcon's

Trustee issued aggregate balance due bills. Therefore, its Trustee may not reap windfall profits from Transcon's violation of federal law.

Transcon cannot "have it both ways." It solicited and obtained its shippers' traffic to the exclusion of its competitors by not notifying its customers on its freight bills that the failure to pay freight charges within its credit rules would result in a penalty. Had Transcon billed its customers penalty charges upon expiration of its credit period, they would have actual notice of Transcon's credit rules and had the option of diverting their traffic to competitors without a penalty rule.

Under the circumstances, Transcon is precluded from enforcing its penalties and it is bound to collect only the initial discounted freight charges published in its tariff. Stated differently, Transcon is precluded from applying the penalty provisions in its tariff for failure to comply with the Commission's regulations promulgated pursuant to a clear statutory directive.

ARGUMENT

I. THE I.C.C. EXERCISED ITS PLENARY AUTHORITY REGULATING A CARRIER'S EXTENSION OF CREDIT

A. The I.C.A. Restricts Common Carriers' Extension of Credit to Shippers

The Interstate Commerce Act mandates that a carrier

> shall give up possession at destination of property transported by it *only* when payment for the transportation or service is made.

49 U.S.C. § 10743(a) (emphasis added). However, that section carves out an exception to the statutory prohibition on the extension of credit:

> *Under the regulations of the Commission* governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service.

49 U.S.C. § 10743(b)(1) (emphasis added). Thus, Congress statutorily granted the I.C.C. a specific authority: the power to regulate the terms of payment between common carriers and shippers for transportation services. In promulgating, interpreting and enforcing its regulations governing a carrier's extension of credit, the I.C.C. is acting at the zenith of its authority. This Court has held that:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such regulations are given controlling weight unless

> they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[ ]

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (footnote omitted). *See also, Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598, *7 n. 2 (May 16, 1994); *Udall v. Tallman*, 380 U.S. 1, 17 (1965). The extension of credit is clearly a statutory "gap" explicitly left for the I.C.C. Therefore, it is Congress, not the I.C.C., which has said that a carrier may extend credit (and presumably, collect liquidated damages for late payment) only when it complies with the Commission's regulations.[2]

B. The I.C.C.'s Regulations Allow Liquidated Damages, Not an Undercharge Liability

The I.C.C.'s credit regulations allow a carrier to assess charges for late payment by issuing either: 1) a separate freight bill reflecting the charges constituting the carrier's liquidated damages for the shipper's untimely payments; or 2) a revised freight bill seeking the undiscounted filed rate. 49 C.F.R. § 1320.2(g)(1)(i) and (ii). Thus, the I.C.C.'s credit regulations require that carrier's

[2] There is no evidence that Transcon ever challenged the regulations at issue when they were promulgated in 1988. I.C.C. Pet. for Cert. Reply Brief at 2.

give shippers *actual* notice of its credit period and the amount of liquidated damages. 49 C.F.R. § 1320.3(c)

The purpose of the I.C.C.'s "loss of discount" provision was not to penalize shippers for failing to pay the freight bills in a timely fashion. *The Mennen Company v. Campbell 66 Express, Inc., et al.*, No. MC-C-30135, 1989 WL 239321 (Sept. 6, 1989), *aff'd sub nom, Delta Traffic Service, Inc. v. The Mennen Company*, 730 F. Supp. 1309 (D. N.J. 1990), *aff'd*, 919 F.2d 134 (3rd Cir. 1990). Rather, it was intended to serve as liquidated damages for the expenses that carriers presumably would incur collecting the unpaid charges. The goal was to reimburse carriers for collection expenses and not to merely give them additional revenue. *See*, 49 C.F.R. § 1320.2(g). In this case, there is no evidence that collection expenses were ever incurred by Transcon before it discontinued operations.

II. TRANSCON'S COMPLIANCE WITH THE I.C.C.'S CREDIT REGULATIONS IS A CONDITION PRECEDENT TO TRANSCON'S ENFORCEMENT OF ITS LOSS OF DISCOUNT TARIFF PROVISION

The Commission's regulations allow a carrier to extend credit by "tak[ing] reasonable actions to secure payment of the tariff charges." 49 C.F.R. § 1320.2(a)(2). To ensure payment, the regulations enable the carrier to institute late payment charges upon expiration of the credit period, but it must notify shippers that: the rule bars late paying shippers from "free use of funds;" the carrier does not condone late payment; and the carrier may not extend credit to a delinquent shipper. 49 C.F.R. § 1320.2(e)(3)(i) and (ii).

If a carrier chooses to employ a loss of discount tariff provision for its liquidated damages (as Transcon did), the regulations require that the tariff "identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain." 49 C.F.R. § 1320.2(g)(1)(ii). The carrier must state in its tariff rule "the exact amount of the [liquidated damages] charges" either as a dollar figure or percentage of the freight bill, as well as the credit period "within which the shipper must pay to avoid such liquidated damages." 49 C.F.R. § 1320.2(g)(1)(i).

A. The I.C.C.'s Credit Regulations Require Actual Notice to Shippers of Transcon's Loss of Discount Provision

The carrier must do more than insert a credit period and liquidated damages provision in its tariff. First, the liquidated damages must be stated in the tariff. 49 C.F.R. § 1320.2(g)(2)(i). Second, the liquidated damages must be applied in a non-discriminatory manner. 49 C.F.R. § 1320.2(g)(2)(ii). Third, liquidated damages cannot be applied on "aggregate balance due claims," but rather the late payment fee must be assessed on "original, separate, and independent freight bills." 49 C.F.R. § 1320.2(g)(2)(iii). Fourth, liquidated damages do not apply where there is a clerical error. 49 C.F.R. § 1320.2(g)(2)(iv). Fifth, liquidated damages do not apply where the carrier's bill of lading already provide for the shipper's liability for those fees. 49 C.F.R. § 1320.2(g)(2)(v). Finally, liquidated damages are to be applied after the credit period expires where *the carrier* has generated a "revised" invoice or notice within ninety

days of the credit period's expiration date. 49 C.F.R. § 1320.2(g)(2)(vi).

There is, however, an important section of the regulation which must be read in conjunction with the sections cited above. Section 1320.3(c) states:

> (c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge and/or collection expense charge and discount terms.* When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penalties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and applicable service charge and/or collection expense charge and discount terms.

49 C.F.R. § 1320.3(c). The Commission directed that the carrier would state on the freight bill itself the applicable discount and payment period as well as the nondiscounted rate required if the shipper made an untimely payment.

Unlike the filed rate doctrine which operates upon constructive notice, the I.C.C.'s credit regulations require actual notice of the rates to the shipper. It is this point upon which the Ninth Circuit's decision errs. It held in its original opinion:

> Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then has no greater force than the policy rejected in

> *Maislin*. Although the Act authorizes the ICC to regulate the carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

I.C.C. v. Transcon Lines, 990 F.2d 1503 (9th Cir. 1993), Pet. at 32a. The Ninth Circuit failed to understand that the carrier's collection of liquidated damages is not a byproduct of the filed rate doctrine, but the I.C.C.'s credit regulations. The court of appeals' reliance on *Maislin* is misplaced since the Commission's Negotiated Rates Policy conflicted with the plain language of the I.C.A. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 117, 130 (1990). In the case at bar, the regulations are authorized by the statute itself and thus, no conflict exists because Congress delegated authority to the I.C.C. to fill a specifc "gap" purposely left in the statute.

In essence, the I.C.C.'s credit regulations are a self-help remedy for carrier's who extend credit, without resorting to the courts. However, in order to take advantage of those regulations, the carrier must comply with the I.C.C.'s regulations as a condition precedent to exercising its credit rule remedy.

III. THE FILED RATE DOCTRINE IS NOT ABSOLUTE

A. *Maislin* and Its Progeny Limit the Filed Rate Doctrine

The trustees of bankrupt carriers would interpret this Court's recent decisions as holding the collection of undercharges based on the filed rate doctrine as an absolute right. However, the trustees' view would elevate the filed rate doctrine above the other principles of the Interstate Commerce Act and deny the Commission's statutory mandate and discretionary powers. This view does not comport with the case law.

While the Court held in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), that a bankrupt carrier could recover undercharges because the I.C.C.'s Negotiated Rates Policy violated the filed rate doctrine, it defined the parameters of the filed rate doctrine in *Reiter v. Cooper*, 113 S. Ct. 1213 (1993):

> Respondents contend that the so-called "filed rate doctrine" gives them absolute entitlement to judgment on their undercharge claims, without defense or counterclaim. We disagree. The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. . . . It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses *specifically accorded by the ICA itself*.

Id. at 1219 (citations omitted and emphasis added). The Ninth Circuit failed to recognize that the Court circumscribed the filed rate doctrine in *Reiter* in relation to the other sections of the I.C.A. Although *Reiter* is instructive as to the limits of the filed rate doctrine in an undercharge case against a *shipper*, it does not answer the question presently before the Court: whether the I.C.C. can enjoin a carrier from collecting liquidated damages when the carrier fails to comply with the Commission's credit regulations.

B. This Court's Decision in *Security Services v. Kmart* Requires Deference to the I.C.C.'s Credit Regulations

This Court recently upheld the I.C.C.'s "void-for-nonparticipation" regulation in *Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598 (May 16, 1994) (*"Kmart"*), and affirmed two basic principles: the I.C.C.'s authority over tariff form, and judicial deference to an agency's interpretation of its regulations. Thus, the Court acknowledged the I.C.C.'s

> authority to "prescribe the form and manner" of tariff filing, § 10762(b)(1), and the information to be included in tariffs beyond any matters required by statute, § 10762(a)(1).

Id. at *3. This statutory authority is axiomatic since the I.C.A. regulates extensions of credit by a carrier. Thus, the only legal source of Transcon's tariff rule governing its extension of credit is the Commission's regulations.

In upholding the I.C.C.'s "void-for-nonparticipation" regulation in *Kmart*, the Court held

> Petitioner argues that the effect of the void-for-nonparticipation rule is to allow transactions to be governed by secretly negotiated rates, rather than the publicly filed rates mandated by the Act. Petitioner would thus have us see the ICC's recent enforcement of its void-for-nonparticipation regulations as merely an attempt to evade *Maislin* and undermine the filed rate doctrine by keeping trustees or debtors-in-possession from recovering undercharges.

Id. at *5. This is precisely the argument Transcon advances, and the Ninth Circuit adopted. The Ninth Circuit held that to allow the I.C.C. enjoin a carrier from seeking liquidated damages because of its credit regulations would "permit an end-run around the filed rate doctrine." *I.C.C. v. Transcon Lines*, 9 F.3d 64, 66 (9th Cir. 1993), Pet. App. A at 6a. This Court rebuffed such an argument in *Kmart* stating:

> The argument is an odd one.[ ] The filed rate requirement mandates that carriers charge the rates filed in a tariff. We held in *Maislin, supra*, that the requirement was not subject to discretionary enforcement when raised against a shipper who had agreed with a carrier to a negotiated rate lower than the rate on file. When the carrier's bankruptcy prompted second thoughts about the wisdom of the agreement, the carrier and its creditors obtained the benefit of the requirement. Here, as in *Jasper Wyman, supra*, the carrier seeks to escape its burden by recovering for undercharges even though in effect it had no rates on file because its tariff lacked an essential element. The filed-rate rule applied here to bar the carrier's recovery is the same rule that was applied to bar the shipper's

> defense. Nor is the rule somehow more technical or less equitable when applied against Security Services. It can hardly be gainsaid that a carrier employing distance rates without purporting to be bound by stated distances would be just as well placed to discriminate among shippers by measuring with rubber instruments as it would be by charging shippers for a stated distance at mutable rates per mile. While some may debate in other forums the wisdom of the filed rate doctrine, it is enough to say here that the carriers cannot have it both ways.[ ]

Kmart, at *5 (footnotes omitted). The filed rate doctrine charges shippers with notice of the penalties published by Transcon in its tariff for late payment of freight charges. However, shippers are also charged, as are carriers, with constructive notice of the Commission's regulations requiring the printing of warnings on freight bills that the failure to pay on time may incur penalties. Transcon ignored that requirement, for if it had complied, its shippers would certainly have diverted their traffic to carriers that opted not to impose such penalties. Transcon continued to accept shipments without enforcing its credit rules, thus enjoying the revenue at discounted rates, and may not now collect additional revenues when shippers no longer have the option of choosing competitive carriers not imposing penalties. The Commission's regualtions thus implement Congress' objective when enacting the Motor Carrier Act of 1980 to make the motor carrier industry more competitive. *Security Services, Inc. v. Kmart Corp.*, 93-284, ___ S. Ct. ___, 1994 WL 183598, *4.

Furthermore, the Court recognized that the I.C.C.'s

> interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). The ICC's interpretation is neither.

Security Services, Inc. v. Kmart Corp., 93-284, ___ S. Ct. ___, 1994 WL 183598, *7 n. 2 (May 16, 1994). Here, it is the application of the I.C.C.'s credit regulations and the effect of Transcon's noncompliance with those regulations which are at issue. The rationale applied by the Court in *Kmart*, however, is warranted in the instant case as well because the Ninth Circuit's decision rests on two faulty assumptions.

First, the court assumed that there is a conflict between the filed rate doctrine and the I.C.C.'s credit regulations. Whatever conflict the Ninth Circuit perceived has been resolved by *Kmart*. In that case, the I.C.C.'s void-for-nonparticipation rule was more drastic than the credit regulations since it voided a carrier's tariff *ab initio* if it did not participate in the mileage guide. The majority in *Kmart* was not troubled by the result of their decision which left unfiled contract rates intact without collection of the filed rate because the carrier had an incomplete tariff. Here, the "conflict" is between a liquidated damages tariff rule and its legal source (i.e., the I.C.C.'s credit regulations). To the extent that the Ninth Circuit relied upon *Overland Express, Inc. v. I.C.C.*, 996 F.2d 356 (D.C. Cir. 1993), *pet. for cert. granted, judgment vacated and remanded*, 62 U.S.L.W. 3420 (U.S. May 23, 1994) (No. 93-883) and *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993), *pet. for cert. granted, judgment vacated and remanded*, 62 U.S.L.W. 3503 (U.S. May 23, 1994) (No.

93-1129), in its decision on remand as authority for striking down an I.C.C. regulation because of the filed rate doctrine, the Ninth Circuit must be reversed in light of this Court's decision in *Kmart*. *See*, 9 F.3d 64, 66-67 (1993), Pet. at 7a-8a.

Secondly, the Ninth Circuit assumed that the timely payment of freight charges as a condition precedent to a shipper receiving the discount somehow converts that discount into an unfiled negotiated rate which deprives the carrier of its lawful tariff rate. But unlike the facts in *Kmart*, the undercharges that Transcon's trustee seeks to collect is the difference between two filed rates. Thus, Transcon is not in the same predicament as the carrier in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982) ("Commercial Metals"), where no freight charges were paid. More importantly, the Ninth Circuit misunderstood that it is the policy behind the filed rate doctrine which is at the heart of this case: without complying with the I.C.C.'s credit regulations, a carrier would be free to discriminate by altering credit terms for favored shippers and revoking filed discounts for less favored shippers.

C. Only the I.C.C. May Enforce Its Credit Regulations

In *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982), this Court held that a carrier's violation of the I.C.C's credit regulations does not afford a shipper an equitable affirmative defense to an undercharge action. The Court has reaffirmed that a shipper has no equitable defenses to an undercharge

claim, but only those defenses accorded to a shipper by the I.C.A. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990); *Reiter v. Cooper*, 113 S. Ct. 1213, 1219 (1993). However, the Court noted that "the intent of the [credit] rules was to protect carriers, not to penalize them." *Commercial Metals*, at 345. The rationale behind the Court's holding in *Commercial Metals* was that

> Courts were concerned that a rule permitting selective estoppels would defeat the anti-discriminatory purpose of the Act and would weaken the capital structure of common carriers.

Id. at 346. However, the purpose of the rule to protect the carrier extending credit is balanced by the regulation's protection of the shipper from a carrier abusing its credit rules in an undercharge action by prohibiting "aggregate balance dues." 49 C.F.R. § 1320.2(g)(2)(iii). Since *Commercial Metals* holds that a shipper cannot defend an undercharge based on the carrier's violation of the I.C.C.'s credit regulations, then how can the credit regulations be enforced if the I.C.C. is not permitted to enjoin Transcon? This Court held in *Commercial Metals* that "[t]he remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." *Id.* at 352. In this light, the Ninth Circuit's refusal to allow the I.C.C. to enjoin Transcon becomes patently absurd. If the I.C.C. cannot enjoin Transcon in this context, the courts would defeat the very "antidiscriminatory purpose of the Act" which *Commercial Metals* sought to uphold.

1. This Court's Precedents Seek Balance Between Carriers and the I.C.C.

The same rationale for balance between protecting the carrier and the I.C.C.'s authority applied in *Commercial Metals* compelled the Court to limit the I.C.C.'s power to reject a carrier's tariff because

> Rejection of an effective tariff applies retroactively, and can have serious consequences for affected motor carriers. Rejection renders the tariff void *ab initio*. . . . As a result, whatever tariff was in effect prior to the adoption of the rejected rate becomes the applicable tariff for the period during which motor carriers charged the rejected tariff.

I.C.C. v. American Trucking Associations, Inc., 467 U.S. 354, 359 (1984) (citations omitted). The Court was concerned that carrier would be exposed to overcharges, and therefore, held that

> The Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act. 49 U.S.C. § 10321(a). As we have held in the past, the Commission also has discretion to take actions that are " 'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory authority.' " . . . *We have recognized that the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals.* In this case, the Commission argues that the retroactive rejection of rate-bureau tariffs is simply an adjunct to the Commission's § 10762(e) rejection authority, and that, to the extent that there is an elaboration on

> that authority, it is necessary to ensure compliance with rate-bureau agreements. In these narrow circumstances, we agree.

Id. at 364-365 (emphasis added). In upholding the I.C.C.'s power to retroactively reject an effective tariff, the Court ruled that the Commission may exercise its discretionary power if it: 1) furthers a specific statutory mandate, and 2) is directly and closely tied to that mandate. *Id.* at 367. In the opinion below, the Ninth Circuit failed to realize that only two situations would make the I.C.C. aware of a carrier's violation of the credit regulations: 1) upon the filing of a complaint by a shipper with the I.C.C. alleging discrimination; or 2) when the carrier files an undercharge claim against a shipper. *See, I.C.C. v. Transcon Lines*, 9 F.3d 64, 66-67 (9th Cir. 1993), Pet. at 6a. Even assuming that the I.C.C. relies on its discretionary power (as opposed to its explicit statutory mandate), denying the I.C.C. the power to enjoin Transcon in an undercharge context would render its credit regulations a nullity since a carrier could threaten a shipper with an undercharge claim if the shipper ceased doing business with Transcon when a credit problem occurred.

The holding in *Commercial Metals* rests on the rationale that a shipper who uses the carrier's violation of credit regulations as a defense imposes a "judicially created remedy of forfeiture of freight charges." *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 350 (1982). But the facts of the case at bar are distinguishable from *Commercial Metals*. Here, Transcon accepted the freight charges filed in its tariff, and has not been deprived of compensation for the transportation

services it provided. If Transcon wanted liquidated damages for extending credit to a shipper who did not make timely payment, it should have exercised its tariff rule within ninety days of the credit period expiration instead of waiting years later to sue a shipper for an enormous undercharge.[3]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[3] The Court noted in *Commercial Metals* that the "double payment" line of cases all involved a carrier's misrepresentation. *Commercial Metals*, at 336. *Amicus* submits that Transcon is guilty of misrepresentation by omission in not stating the applicable credit terms on the original freight bill. While the Trustee may argue that shippers are on constructive notice of all rules and rates in Transcon's tariff, *Amicus* asserts that the I.C.C. credit regulations require actual notice to the shipper of the penalty for late payment.

(8)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AND THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Amici Curiae will address the following question:

Whether the filed rate doctrine precludes the Interstate Commerce Commission from enforcing credit regulations adopted for the protection of shippers under a directive in Section 10743 of the Interstate Commerce Act and under its mandate to "bring a civil action ... to enforce" its regulations in 49 U.S.C. Section 11702(a)(4).

TABLE OF CONTENTS

	PAGE(S)
QUESTION PRESENTED	i
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE NINTH CIRCUIT'S RATIONALE EFFECTIVELY STRIKES THE CREDIT PROVISIONS FROM THE INTERSTATE COMMERCE ACT	7
II. THE DECISION OF THE NINTH CIRCUIT IS CONTRARY TO THIS COURT'S DECISIONS	11
A. *Commercial Metals*	12
B. *ICC v. ATA*	14
C. *Maislin*	15
D. *Reiter v. Cooper*	16
E. *Kmart*	19
III. THE DECISION BELOW IS IRRECONCILABLE WITH DECISIONS BY OTHER COURTS	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	PAGE(S)
ADM of Mississippi, Inc., 1990 Fed. Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.)	23
Brizendine v. Cotter & Co., 4 F.3d 457 (7th Cir. 1993), *vacated* 62 U.S.L.W. 3768 (1994)	22
Delta Traffic Service, Inc. v. ADM of Mississippi, Inc., No. 91-1098 (5th Cir. 1992)	23
Delta Traffic Service, Inc. v. Mennen Co., 730 F.Supp. 1309 (D. N.J.), *aff'd. mem.* 919 F.2d 134 (3d Cir. 1990)	23
Delta Traffic Service, Inc. v. Purdue Frederick Co., 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D. Conn. 1989)	23
Hewitt-Robins v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962)	16
ICC v. American Trucking Associations, 467 U.S. 354 (1984)	14, 15
ICC v. Transcon Lines, 990 F.2d 1503 (9th Cir. 1992), *vacated and remanded*, 113 S.Ct. 2955 (1993), *on remand*, 9 F.3d 64 (9th Cir. 1993), *cert. granted*, 114 S.Ct. 1536 (1994)	*passim*
Lifschultz Fast Freight, Inc. v. National Manufacturing Co., 804 F.Supp. 1059 (N.D. Ill. 1992)	23
Maislin Industries U.S. Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	*passim*
The Mennen Co. v. Campbell 66 Express, Inc. and Delta Traffic Service, Inc., Docket No. MC-C-30135 (Aug. 28, 1989) (1989 WL 239321 I.C.C.)	23

Moskal v. United States, 498 U.S. 103 (1990)	8
Olson Distributing Systems, Inc. v. Glasurit America Inc., 850 F.2d 295 (6th Cir. 1988)	13
Overland Express, Inc. v. ICC, 996 F.2d 356 (D.C. Cir. 1993), *vacated* 62 U.S.L.W. 3768 (1994)	22
Regulations for Payment of Rates and Charges, 4 I.C.C. 2d 340 (1988)	4, 5
Regulations for Payment of Rates and Charges, 5 I.C.C. 2d 691 (1989)	5
Reiter v. Cooper, __ U.S. __, 113 S.Ct. 1213 (1993)	*passim*
Security Services, Inc. v. Kmart Corp., 62 U.S.L.W. 4329 (May 16, 1994)	19, 20, 21, 22
Security Services, Inc. v. P-Y Transportation, Inc., 3 F.3d 966 (6th Cir. 1993)	22
Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982)	12, 13, 14, 24
Towns of Concord, etc. v. FERC, 955 F.2d 67 (D.C. Cir. 1992)	18
STATUTES AND REGULATIONS	
49 U.S.C. § 10321(a)	14
49 U.S.C. § 10701(a)	15
49 U.S.C. § 10704(b)(1)	15
49 U.S.C. § 10743	7, 12, 13
49 U.S.C. § 11702(a)(4)	12
49 C.F.R. Part 1320	*passim*

No. 93-1318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, ET AL.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AND THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici Curiae are three national associations of shippers of freight. It is understood that their members, directly or indirectly, are responsible for routing most of the nation's freight. Virtually all of their members have been presented with so-called undercharge claims after motor carriers cease operating and typically years after the shipments were made. Claims for massive rate penalties for assertedly late payments, such as those

involved in this case, are one strain of the undercharge virus which has created an epidemic of cases inundating the judicial system.

Amicus Health and Personal Care Distribution Conference, Inc., is comprised of approximately 70 companies that ship health and personal care products nationwide via motor carriers. *Amicus* National Small Shipments Traffic Conference, Inc., is an association with approximately 450 shipper members, consisting of small and large companies shipping via motor carriers.

Amicus The National Industrial Transportation League is comprised of approximately 1,300 shippers and groups and associations of shippers conducting large, medium and small industrial and commercial enterprises in every state. Its members are substantial shippers of freight by motor carriers.

The issue presented by the holding below is of great importance to the *amici* because their members are included among the thousands of shippers being sued by the Trustee for Transcon Lines and by other nonoperating motor carriers for late payment penalties. These claims are being asserted in violation of the Commission's credit regulations, which on their face require advance notice of the prospective penalty on the freight bill and prompt follow-up with notice of late payments and of applicable penalty charges to lawfully impose such penalties. These *amici* were instrumental in the formulation and adoption of the credit regulations in order to protect the shipping public from exactly the type of claims presented to Transcon's customers by the Trustee. Because of their reliance upon these regulations, *amici* wish to present their views to the Court.

STATEMENT

The Trustee for Transcon Lines has brought hundreds of actions for asserted undercharge claims against its former shippers on the basis of a loss of discount rule in its tariff. The rule provided as to shippers whose freight shipments were delivered

on credit (*i.e.*, without payment upon delivery of freight), that when the freight bill is not paid within 90 days, the discounted tariff rate would no longer apply and a higher undiscounted tariff rate would become applicable. Transcon's rule also made explicit reference to the Commission's credit regulations, which allow discount forfeitures only under certain prescribed conditions. If applied, the penalty would be enormous because the undiscounted rates were typically double the discounted rate.

Notwithstanding the specific requirements in the Commission's credit regulations, Transcon (1) failed to include a statement on the initial freight bill that the charges shown thereon would be doubled if the bill was not paid within 90 days; and (2) failed to rebill the shipper for the full rate within 90 days. Thus, not only had its customers received no notice of the prospective penalty, but they had no way of knowing that their payments were late, because Transcon was not applying such a penalty while it was in operation. It remained for the Trustee to assert such claims after Transcon's demise as one part of a creative undercharge program, whereby it filed suits against over 300,000 former customers.

Because many of Transcon's late payment penalty suits in the bankruptcy court involved sums of money not adequate to support the cost of litigation, the Interstate Commerce Commission brought an action for an injunction to prevent Transcon from claiming late payment penalties in violation of its credit regulations. Transcon had not only not complied with the freight bill notice requirement but also had not complied with the other prerequisites, *i.e.*, rebilling within 90 days after the failure to pay and individual rebillings rather than amassing bulk collection claims. Thus, literally every one of Transcon's suits for late payment penalties was brought in direct contravention of the Commission's regulations.

The history of this case is presented in detail in the original opinion of the court below and in its Order after remand from

this Court. This Court previously granted certiorari, vacated the Ninth Circuit's judgment in *ICC v. Transcon Lines*, 990 F.2d 1503 (9th Cir. 1992), and remanded for further consideration in light of its decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). *I.C.C. v. Transcon Lines*, 113 S.Ct. 2955 (1993). Thereafter, the court of appeals, fearing that enforcing the credit regulations would somehow "open an end-run around the filed rate doctrine," reinstated its original ruling to affirm the summary judgment in favor of the Trustee, *ICC v. Transcon Lines*, 9 F.3d 64 (9th Cir. 1993). The court of appeals enigmatically noted in its opinion that this would leave "the ICC sufficient authority to enforce its credit regulations by other means." (9 F.3d at 67, Pet. App. 9a.)

It is important to provide some background regarding the involvement of *amici* in this saga. Historically, the credit regulations of the Commission did not allow a loss of discount penalty for late payment and the carriers (quite properly, we believe) were limited to interest on the amount owed. During the years 1986-1989, at the instance of the American Trucking Association as representative of the trucking industry, the Commission conducted a rulemaking to determine whether it should authorize late payment penalties in the form of forfeiture of the discount rates then becoming pervasive. *Amici* were the leading shipper parties to that proceeding. They were appalled by the nature of this type of penalty and how it would operate inversely to the amount of money owed to the carrier. For example, if the base rate were $100 and the discount 10 percent, the late payment forfeiture on the delinquent $90 freight bill would be $10. Conversely, at the base rate of $100 and a discount of 50 percent, the late payment forfeiture on the delinquent $50 freight bill would be $50.

The Commission first adopted a rule which would countenance such gross and inequitable loss-of-discount penalty provisions in *Regulations for Payment of Rates and Charges*, 4

I.C.C. 2d 340, 345-47 (1988).[1] *Amici* were then faced with either pursuing an appeal or seeking to have protections included in the rule so as to provide shippers with actual notice of the prospective penalty for late payment. The revised credit regulations under consideration in this case were specifically adopted by the Commission to prevent carriers from aggregating large penalties on bills which gave no notice of the penalty (as required by 49 C.F.R. § 1320.3(c)) or where the penalty was not brought to the attention of the shipper by rebilling within 90 days, in order to avoid recurrent late payments (as required by 49 C.F.R. § 1320.2(g)(2)). *Regulations for Payment of Rates and Charges*, 5 I.C.C. 2d 691 (1989).

These specific revised regulations were adopted by the Commission at the instance of *amici* and with the joint sponsorship of the American Trucking Associations, 5 I.C.C. 2d at 691. Shippers certainly did not expect that after they had relied on the protection of these regulations for several years, a court would now say that they are ineffective to serve their only purpose, or that the Commission could not obtain an injunction to enforce them.

SUMMARY OF ARGUMENT

The ICC's credit regulations were intended to permit carriers to recoup legitimate collection expenses while providing timely notice to shippers of their late payments and their exposure to penalty charges. However, because of Transcon's admitted violations of those regulations, it had no collection expenses in most cases. For their part, though most shippers paid Transcon's original freight bills in full, they may have paid late, in ignorance of the payment deadline and of Transcon's severe loss-of-discount penalty. Transcon's violations thus

[1] As relevant here, the only significant measure taken by the Commission to protect shippers from abusive undercharge claims in the 1988 version of its credit regulations was a prohibition against the assertion of aggregate balance-due claims on past shipments. 4 I.C.C. 2d at 349.

thwarted *both* of the intended goals of the credit regulations. To address these violations and to prevent a $15 million windfall to Transcon, the ICC sought injunctive relief.

In rejecting the ICC's position, the Ninth Circuit embraced an interpretation of the filed rate doctrine so extreme as to reward Transcon for its violation of ICC regulations. In the view of the Ninth Circuit, this result is mandated by prior law which it reads as according absolute legal supremacy to tariffs. The court of appeals could not be more wrong.

In the first place, the Ninth Circuit's analysis rests on a conception of the factual context of this case that is the reverse of reality. Ignoring a *real* parade of horribles, in which this carrier laid a trap and then sued hundreds or thousands of former shippers after bankruptcy, the court concocts a scenario in which Transcon engages in a conspiracy with shippers whose apparent goal is nonpayment of freight bills, with the ICC's blessing. This makes no sense, as all the rates originally billed were shown in Transcon's filed tariffs.

The court below also claims support for its position in *Maislin Industries U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *Reiter v. Cooper*, ___ U.S. ___, 113 S.Ct. 1213 (1993). However, these decisions do not support the Ninth Circuit's position. *Maislin* preserved ICC unreasonable practice jurisdiction where, as here, the question is which of two filed rates to apply. *Reiter v. Cooper* made it clear that the filed rate doctrine does not supersede other provisions of the Interstate Commerce Act.

Finally, the Ninth Circuit fails to consider the law in the context of other tariff-related decisions since 1980. In particular, this Court has issued a line of decisions establishing that the ICC remains the primary arbiter of carrier conduct in today's more competitive environment. And other courts have issued decisions that cannot be reconciled with the decision below.

The Ninth's Circuit's position is not just wrong, but dangerously wrong. It relegates duly promulgated agency regulations to a position of being completely vulnerable to contravention by carriers choosing not to abide by them. The decision below must be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S RATIONALE EFFECTIVELY STRIKES THE CREDIT PROVISIONS FROM THE INTERSTATE COMMERCE ACT

The Interstate Commerce Act *prohibits* carriers from extending credit to their shippers for paying freight bills except "*under regulations of the Commission.*" 49 U.S.C. § 10743. Compliance with the regulations is thus mandated by Congress for *any* extension of credit. The specific regulations that Transcon violated were adopted expressly to prevent credit provisions in carrier tariffs from becoming the very trap for the unwary that Transcon has now sprung.

Where the carrier notes its loss-of-discount penalties on its freight bills and rebills for the higher penalty amounts within 90 days after expiration of the authorized credit period, the shipper is put on notice of the penalty and of its failure to meet the specified payment date. If the shipper receives notice that it has paid a bill late, it can take corrective action and prevent the accumulation of a large penalty balance. The practical impact of the Ninth Circuit's decision is that a carrier can stand by and accumulate three years of bills before it goes bankrupt, without telling the shipper along the way that any payment arrived late.

Thus, this case does not involve a minor or inadvertent deviation from some technicality in the Code of Federal Regulations. As to all its shippers, Transcon consistently ignored *all* the key requirements of the regulations governing imposition of the additional penalty charges it seeks to collect. Yet the

Commission's credit regulations were the sole authorization under the statute for Transcon's 90-day credit penalty.

The Ninth Circuit's decision hinges upon its misreading of this Court's decision in *Maislin* and a disregard of *Reiter*, along with other relevant authorities. Ultimately, rather than approaching the Interstate Commerce Act as a balanced system of regulation and allowing its various provisions to coexist harmoniously, the Ninth Circuit viewed its task as:

> ...to decide which of two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions.
>
> In deciding which provision should be given priority, we take guidance from the Supreme Court's affirmation in *Maislin* of the vital importance of the filed rate doctrine to the ICA.

9 F.3d at 67; App. 5a to ICC Petition. And in the same vein: "*Reiter* at most requires us to resolve a clash of two statutory claims." (9 F.3d at 67; App. 8a to ICC Petition.)

Certainly, the filed rate provision and the credit provision, including its directive that the ICC issue controlling credit regulations, are both part of the same Act, along with the requirement that carrier rates and practices be reasonable. But the Act was written by Congress to be enforced as a whole, with all its provisions given effect in accordance with established principles of statutory construction. *Moskal v. United States*, 498 U.S. 103, 110-111 (1990).

All the rates to which the credit provision and the implementing ICC regulations apply are "filed rates," so Congress understood that it was not detracting from filed rates when it included credit provisions in the ICA. What the Ninth Circuit lost sight of is that both the rates initially charged by Transcon (all the thousands of discount rates in its rate tariff) as well as

the undiscounted bureau rates in another tariff are likewise "filed rates." This is not a *Maislin* situation where the rate rejected by the court of appeals was unfiled.

In pursuit of a mistaken conception of the filed rate doctrine, the decision below negates utterly the specific authority which Congress delegated to the ICC. If, as the court opines, a rule inserted by a carrier into its tariffs can exempt it from the operation of the ICC's regulations, then carriers would be vested with the power to overrule the ICC in the discharge of a function specifically given it by statute. And, since all the rates to which the credit provision and regulations apply are filed rates, a carrier would hold a veto power over the ICC's credit regulations as to all its rates, exercisable simply by applying its tariff as if the rates apply independently of and whenever contrary to the ICC's rules. In effect, compliance with the ICC's rules would become optional on the part of the carrier and Congress' intent to regulate carriers' credit terms would be defeated.

The court erred not only by reading into the filed rate provision a power of the carrier to veto the ICC's regulations but also in treating the credit regulation as somehow substituting "secret" rates for filed rates and thereby transgressing *Maislin* (where this Court's choice was in favor of a filed rate and against an unfiled rate):

> This result [enforcing ICC credit regulations] would permit an end-run around the filed rate doctrine. A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would purposely violate various credit regulations such as 49 C.F.R. 1320.3(c) which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only

> after a carrier goes bankrupt would the illegal discount be brought to light. But because the carrier intentionally failed to give notice to the shipper the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and the shipper.

9. F.3d at 66-67; App. 6a to ICC Petition.

The court was utterly out at sea in fashioning its hypothesis. All the discount rates at stake in this case (there are thousands of them in Transcon's tariff and all are placed at risk by the Ninth Circuit) are filed tariff rates and not "privately" made discounts. And any rate subject to the ICC's credit regulations would have to be a filed rate visible to the public (the credit regulations apply only to filed tariff rates). The Ninth Circuit suggests that the carrier might "purposely violate various credit regulations". But that is exactly what happened here: Transcon inserted a loss of discount trap in its tariff rule but did not give the actual notice of that prospective penalty on any of its freight bills, in direct contravention of the ICC's rules.

Next, the court laments that "If the ICC goes along, the filed rate would be gutted.... If the ICC looks the other way ... the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper." This is completely at odds with the undisputed facts of this case or any other case where a loss of discount provision might be exercised. There was no "illegal bargain struck by the carrier and shipper," as the discount rates originally billed were published in the tariff. As the shipper was not given the notice required by the Commission that a penalty was due, there is no joint effort of any sort between the shipper and carrier, either publicly or privately. Any attempt to enforce a loss of discount/late-payment penalty is entirely a unilateral operation by the carrier or its trustee-successor.

There is also certainly no occasion for the ICC to "look the other way." The ICC does not receive copies of the carrier's freight bills and would not know that the carrier was not giving the requisite notice to its shippers, until after a suit is brought by the carrier. Finally, the only illegality perpetrated in this scenario is by the carrier, initially by failing to comply with the regulation requiring actual notice of the prospective penalty on the freight bill and again later by issuing claims for a credit penalty (the full undiscounted rate) in direct violation of the ICC's credit regulations.

II. THE DECISION OF THE NINTH CIRCUIT IS CONTRARY TO THIS COURT'S DECISIONS

The essence of the Ninth Circuit's position is that while the ICC may have been given extensive enforcement powers by Congress as to carriers under its jurisdiction, the filed rate doctrine puts the rates in carriers' tariffs beyond the reach of those powers. The court's theory is that once a rate is filed, the ICC may adjudicate its reasonableness if it is challenged by a shipper, but may not otherwise interfere with the carrier's collection of the rate, no matter how egregious the carrier's conduct.

The Ninth Circuit relied for this understanding of the law almost entirely on *Maislin*, and its understanding of *Maislin* was unshaken by this Court's remand for reconsideration in light of *Reiter v. Cooper*. To the court below, *Reiter v. Cooper* merely clarified *shippers'* rights under the caveat to the filed rate doctrine noted in *Maislin*.[2] However, the Ninth Circuit recognizes no caveat for the credit provision in the same Act.

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[2] "The filed rate doctrine, howe .er, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." See *Maislin*, 497 U.S. at 128.

As will be seen, this analysis is not supported by *Maislin* itself, and the Ninth Circuit's narrow focus on the procedural aspects of *Reiter v. Cooper* has blinded it to that decision's substantive lesson, *viz.*, that the other provisions of the Interstate Commerce Act are not merely window dressing for the filed rate doctrine.

Amici would also point out that *Maislin* and *Reiter* are two in a succession of five important decisions on carrier tariffs issued by this Court since the 1980 amendments to the Interstate Commerce Act. Read together, these decisions leave no doubt as to the Ninth Circuit's error.

A. *Commercial Metals*

In *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982) the Court squarely recognized that the ICC credit regulations promulgated under 49 U.S.C. § 10743(b) are included within the regulations that the Commission may enforce by seeking a civil injunction. The Court stated "that the ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes ... the power to seek a federal-court injunction requiring a carrier to comply with the regulations...." The Court made that statement in the context of pointing out that, by refusing to allow a shipper to use a carrier's admitted violation of the ICC's credit regulations as an affirmative defense in the carrier's action to collect the filed tariff rate, it was not leaving the carrier free to violate those regulations with impunity. 456 U.S. at 349.[3]

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[3] The Commission's enforcement authority is set forth in 49 U.S.C. § 11702(a)(4). The current section is a recodification, without substantive change, of former 49 U.S.C. § 322(b), authorizing the Commission to seek enforcement "by writ of injunction or other process, mandatory or otherwise."

The identical principle must be applied here, where one of the key questions is whether the application of the ICC's authority to seek a court injunction to enforce its credit regulations may have the effect of indirectly preventing the collection of the filed rate. Plainly, the existence of the ICC's express statutory power to seek and obtain civil injunctions against violations of regulations adopted by the Commission to implement the statutory policies of 49 U.S.C. § 10743(b) establishes the power of the Commission to condition, if necessary, the application of the filed rate doctrine.

To the extent that there are differences between this case and *Commercial Metals*, they compound the Ninth Circuit's error. For example, in *Commercial Metals*, the Court noted that the regulations themselves did not provide that a carrier violation precluded collection. The current regulations do prohibit collection of *penalty* charges where the carrier has violated the credit rules. See, *e.g.*, 49 C.F.R. § 1320.2(g)(iii) and (vi). The first of these subsections states that the penalty "shall be applied only to the nonpayment of original separate and independent freight bills and shall not apply to aggregate balance-due claims sought for collection on past due shipments by a bankruptcy trustee, or any other person or agent." Subsection (vi) permits collection "only" where the 90-day rebilling requirement has been met.

It is also important to note that in *Commercial Metals* the shipper was trying to use the carrier's violation of the credit rules as an excuse for paying no freight charges to the carrier. In *Transcon*, freight charges have already been paid, and the issue concerns the carrier's desire to collect a penalty on top of those charges despite its violations of ICC regulations. *Transcon* is, therefore, akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the rule. 456 U.S. at 351. See also *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F.2d 295 (6th Cir. 1988), holding

the carrier equitably estopped in a double payment case where its delays in pursuing collection deprived the shipper of notice of the accumulation of charges and led to an escalation of the loss.

B. *ICC v. ATA*

Two years after deciding *Commercial Metals*, this Court decided *ICC v. American Trucking Associations*, 467 U.S. 354 (1984). The Ninth Circuit was plainly aware of *ATA*, citing it in its first decision (990 F.2d at 1514) for the proposition that "[t]he ICC has broad powers to shape remedies for the violation of its rules." But the court of appeals went on to state (*id.*): "[t]he case, however, is different when the ICC seeks an injunction applying its regulations in such a way as to undercut the filed rate requirement. Then *Maislin* governs." The fallacy in this reasoning is that *ATA* itself approved the ICC's exercise of its broad powers "in such a way as to undercut the filed rate requirement." This Court there upheld the Commission's decision that it could retroactively invalidate carrier tariffs.

Indeed, in many respects the ICC's action sustained in *ATA* went far beyond the enforcement action rejected in the decision under review. In *ATA*, the only statutory basis for the Commission's action was 49 U.S.C. § 10321(a), stating generally that the ICC's powers are not limited to those enumerated in the Act. Here, as explained above, Congress explicitly made carriers' credit practices subject to ICC regulations.

Moreover, *ATA* upheld the Commission's power to invalidate tariffs retroactively. 467 U.S. at 364-66. In this case, the ICC regulations took effect long *before* the violations the Commission seeks to enjoin, and those regulations are actually cited in Transcon's tariff item. There is nothing retroactive, or unfair, about requiring carriers to abide by regulations after they take effect. Nor does the ICC seek to "invalidate" Transcon's tariff. If Transcon had complied with the regulations, no injunction

would have been sought, and the only issue in Transcon's undercharge cases would be whether its penalty charges were unreasonably high. Their applicability would be undisputed.[4]

C. *Maislin*

The next in this line of cases was *Maislin*. To be sure, this Court there made clear that the ICC's unreasonable practice jurisdiction was insufficient to elevate unfiled rates to a status of legal parity with filed rates, in the face of the filed rate doctrine.[5] However, even read in isolation, *Maislin* does not lead inexorably to the Ninth Circuit's conclusion.

In its original decision below, the Ninth Circuit stated:

> The ICC also has the initial responsibility of determining if ... 'the practice' of a carrier, as distinct from a rate, is unreasonable, 49 U.S.C. § 10704(b)(1). The interplay of the last statute with the filed rate doctrine was at issue in *Maislin*, which reaffirmed the primacy of the filed rate doctrine. *Id.* at 130, 110 S.Ct. at 2768.

990 F.2d at 1512. (In addition to Section 10704(b)(1), the ICC's unreasonable practice jurisdiction is also derived from 49 U.S.C. § 10701(a).)

This discussion fails to recognize that in the cited portion of *Maislin*, the Court was considering only *unfiled* rates. But on

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[4] It is also worth nothing that the risk of massive overcharge claims against carriers, noted with concern in the dissenting opinion in *ATA*, has given way to a risk of massive undercharge claims by carriers, under the decision below. In today's competitive environment, overcharge claims are virtually nonexistent.

[5] The Court recognized the potentially harsh results of this position but said the remedy lies with Congress. 497 U.S. at 135-36. It is worth noting that Congress has since partially overruled *Maislin* in the Negotiated Rates Act of 1993, reviving the "negotiated rates" defense for undercharge claims on shipments prior to September 30, 1990. See Section 2(e) of the NRA, now printed in the Historical and Statutory Note following 49 U.S.C. § 10701.

the previous page of *Maislin*, 497 U.S. at 129, the Court had made clear that ICC unreasonable practice jurisdiction survives in cases involving a determination, as here, of which of two *filed* rates is controlling. This distinction is developed at some length in footnote 11, where the Court states "None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice has required departure from the filed tariff schedule altogether; instead they have required merely the application of a different filed tariff."[6]

Here, Transcon relied on published tariffs for both of the rates at issue — the original discount rate and the far higher undiscounted class rate claimed as a penalty after the shipper was late in paying the discount rate. The ICC did not challenge the reasonableness of either rate, and admitted that there were no technical tariff filing infirmities. The vice the Commission sought to control was Transcon's cavalier disregard of regulations governing which of the two tariff rates would apply. Correctly read, *Maislin* supports the application of the ICC's unreasonable practice jurisdiction in such cases.

D. *Reiter v. Cooper*

It was on just these grounds that the ICC and shipper *amici* sought review by this Court of the Ninth Circuit's first credit rules decision, and *amici* were optimistic that the court of appeals would see its error after this Court summarily vacated that decision and remanded for reconsideration in light of *Reiter v. Cooper*. Yet the court of appeals ignored the teaching of

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[6] In support of this observation, the Court cited several cases, of which the first was *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), a case recognizing a shipper's right to seek relief from higher rates resulting from carrier misrouting. Notably, one benefit the Court cited was that allowing shippers their day in court would "minimize 'cease and desist' proceedings before the Commission." By its efforts to enjoin Transcon's violations here, the ICC sought to preclude duplicative litigation in the courts.

Reiter that there are other substantive provisions of the ICA which must be carried out beyond the filed rate provision:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. See *Texas & Pacific R. Co. v. Mugg*, 202 U.S. 242, 245 (1906); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 98 (1915); *Pittsburgh, Co., C. & S. L. R. Co. v. Fink*, 250 U.S. 577, 581-582 (1919). It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the ICA itself. We can agree with respondents that this latter category does not include any "unreasonable-rate defense," derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be "reasonable." See *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 468-472 (1959). But we cannot agree that the filed rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

113 S.Ct. at 1219, emphasis in original.

This case is an even more compelling one than *Reiter* for applying the protective provisions of the Interstate Commerce Act. In *Reiter*, there was no question that the filed rate was applicable, but the shipper was seeking to pay a lower unfiled rate on the ground that the filed rate was unreasonable. Here, there are two filed rates: the discount tariff rate billed by the carrier, and a higher penalty rate that, by statute and by regulation, could *only* be collected in compliance with ICC regulations.

The court of appeals would adroitly dispose of *Reiter* by reading it narrowly as recognizing only those sections of the

Interstate Commerce Act which directly confer defenses on shippers and not those sections which indirectly protect shippers through action taken by the Commission. But the thrust of *Reiter* is that there are substantive provisions in the ICA which must be given effect, and are not necessarily to be subordinated to the filed rate provision. As the D.C. Circuit noted in *Towns of Concord, etc. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992), "The filed rate doctrine does not have a life of its own. Its application depends on the underlying statute."

Here there is a statutory scheme which limits credit sanctions to only those prescribed in regulations by the Commission. Thus, the imposition of a credit penalty for late payment is subject to two statutory requirements, not just one: (1) it must be published in a tariff, *and* (2) the carrier must comply with the ICC's credit regulations, including the requirements for actual notice to shippers.

In yet another key respect, this case is a more compelling one than *Reiter v. Cooper* for affording the protection of the Interstate Commerce Act to shippers. It is important to note the language of Transcon's tariff provision which the Trustee relies upon to reject the discount rate and collect the higher undiscounted rate:

> 1. [D]iscounts *** shall apply when tariff charges are paid within 90 calendar days from date of shipment.
>
> 2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 CFR 1322 [*sic*, 1320]. This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

Transcon's tariff thus incorporated by reference the ICC's credit regulations. While the shippers and the ICC would maintain that the terms of the ICC's credit regulations apply whether or not the carrier chose to reference them in its tariff, here there can be no question that the prerequisites of the credit regulations apply because Transcon explicitly incorporated these rules into its tariff.

E. *Kmart*

This Court most recently considered the issue of applying ICC regulations in conjunction with the filed rate doctrine in *Security Services, Inc. v. Kmart Corporation*, 62 U.S.L.W. 4329 (May 16, 1994). In that case, the bankrupt carrier sought to collect higher rates on the basis of mileage rates published in its filed tariff and mileages published in the Household Goods Carriers' Bureau Mileage tariff. Both the tariff rates and the tariff mileages were on file with the ICC, just as Transcon's discount rates and undiscounted rates were on file in this case.

As held in *Kmart*, since the ICC's regulations required not only that the mileage tariff be on file but also that the carrier referencing those mileages be a qualified participant in that tariff, the application of the ICC participation regulation made the mileage rate tariff void as to this carrier.

Notably, while in *Kmart* the higher rate was in the tariff and included a reference to the mileage tariff, it was the Commission's regulations which made those rates inapplicable due to the carrier's failure to participate in the mileage tariff as required by those regulations, through an effective concurrence or power of attorney:

> The Commission's void for-nonparticipation regulation provides that "a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers

> of attorney, tariffs are void as a matter of law." Sec. 1312.4(d).

62 U.S.L.W. at 4330-31.

There is a direct analogy to this case. Here the loss of discount rule on its face purported to take away the discount in 90 days, but the ICC's credit regulations made it a prior condition to the application of such penalty that the carrier give notice of the penalty on the freight bill. None was given, so that the rate penalty was void under the regulation.

Here, as in *Kmart*, the argument of the Trustee (and the Ninth Circuit) against the injunction to enforce the credit regulations is not that those regulations are unauthorized by statute or ultra vires, but rather that the application of the rule in this instance is contrary to law because it would transgress the filed rate doctrine. This Court encountered and dismissed that argument in its opinion in *Kmart*:

> Petitioner's argument in that action is that the Interstate Commerce Act "prescribes the remedies available to Kmart," *id.*, at 17, not that the regulation is ultra vires. Indeed, at oral argument, counsel for petitioner stated that the ICC's void-for-non-participation rule "is authorized. The rule is proper, but the application of the rule ... is contrary to law." Tr. of Oral Arg. 17.

62 U.S.L.W. at 4332, n. 6.

In essence, if Transcon's penalty item is read as incorporating the Commission's credit regulations into it (as developed above), then by its necessary terms the penalty item is properly qualified so as not to apply when notices are not given to shippers. In other words, the penalty item is in the tariff and is valid, but only applies under the appropriate circumstances. Conversely, if the penalty item is read as the Ninth Circuit read

it, *i.e.*, that the discount is lost without giving notice, then the item is void *ab initio*. As stated in *Kmart*:

> The regulation does not require any ICC "retroactive rejection" of a filed rate, or indeed any agency action at all. The regulation works like an expiration date on an otherwise valid tariff in voiding its future application, in accordance with § 1312.23(a).... We thus disagree with the Court of Appeals for the District of Columbia Circuit, which held that once a tariff is in effect, a regulation that voids the tariff operates retroactively.

62 U.S.L.W. at 4332.

In construing tariffs, it is appropriate to read them so as to be legal. In this instance, Transcon's penalty item would only be legal if read as incorporating the Commission's credit regulations as necessary conditions to its applicability. Indeed, the specific reference to the credit regulations in the item itself confirms that interpretation. On the other hand, if the item is read as meaning that the loss of discount penalty was intended to apply despite the carrier's failure to give shippers the notice required in the credit regulations, then Transcon's item must be deemed void *ab initio*. Otherwise, the statute would be read as creating a situation of anarchy whereby the regulations of the regulatory agency, which the shippers read into the tariff as applicable law and were entitled to rely upon, could be disregarded at the lawless whim of the carrier. Surely that was not intended by Congress when it placed this industry under regulation and directed the Commission to issue regulations concerning credit provisions.

III. THE DECISION BELOW IS IRRECONCILABLE WITH DECISIONS BY OTHER COURTS

The Ninth Circuit cites remarkably little case law in support of its extraordinary decision to subordinate a regulatory agency's regulations to the filed rate doctrine. Aside from *Maislin* and *Reiter*, discussed above, the Ninth Circuit relies most heavily on the three court of appeals decisions upholding the carriers' position in mileage guide claims cases.[7] But these decisions are no longer good law after *Kmart*. In fact, two of them have been summarily vacated by this court. 62 U.S.L.W. 3768 (May 23, 1994).

Amici would point out, however, that there are other relevant court of appeals and lower court decisions that warrant a brief discussion. Transcon was not the first bankrupt carrier to file undercharge claims based on the allegation that its former shippers paid freight charges after expiration of the credit period. And, if the decision below is not reversed, the number of such cases will increase. Any bankrupt carrier that has not asserted such penalty claims because of its violation of ICC credit regulations would then be invited to resurrect all such claims, and the lure for other carriers of tariff traps like Transcon's would become irresistible.

The leading case in the lower courts on the issue of violations of ICC credit regulations in an undercharge case involved The Mennen Company, a member of *amicus* The Health and Personal Care Distribution Conference, Inc. Asserting that the bankrupt carrier's claims were invalid due to credit rule violations, Mennen obtained referral of the issue to the ICC under the doctrine of primary jurisdiction; and the Commission found such violations to be unreasonable practices in violation of the

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[7] See 9 F.3d at 66-67, citing *Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993); *Security Services, Inc. v. P-Y Transportation, Inc.*, 3 F.3d 966 (6th Cir. 1993); and *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993).

Act. *The Mennen Co. v. Campbell 66 Express, Inc. and Delta Traffic Service Inc.*, Docket No. MC-C-30135 (Aug. 28, 1989) (1989 WL 239321 I.C.C.). The District Court subsequently granted summary judgment for the shipper, affirming the ICC's decision, and the Third Circuit affirmed in an unpublished opinion. *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd.* 919 F.2d 134 (3d Cir. 1990).

Summary judgment based on a similar ICC decision in *ADM of Mississippi, Inc.*, 1990 Fed. Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.) was affirmed in an unpublished decision by the Fifth Circuit in *Delta Traffic Service, Inc. v. ADM of Mississippi, Inc.*, No. 91-1098 (5th Cir. 1992).

Though no other courts of appeals have addressed the issue, similar conclusions have been reached in federal district court cases. See, *e.g.*, *Delta Traffic Service, Inc. v. Purdue Frederick Co.*, 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D.Conn. 1989) (referring the credit rules issue to the ICC and citing similar decisions in the District of Delaware and the District of Indiana). The ICC also addressed the credit rules issue and found violations in cases referred by district courts in the Districts of New Jersey and Ohio. See the Commission decisions published at 1990 Fed. Carr. Cas. (CCH) ¶ 37,776 and 1992 Fed. Carr. Cas. (CCH) ¶ 37,951 (1991 WL 259987 I.C.C.).[8]

The most recent decision is *Lifschultz Fast Freight, Inc. v. National Manufacturing Co.*, 804 F.Supp. 1059 (N.D. Ill. 1992), the first post-*Transcon* decision dealing with undercharge claims involving penalties claimed in violation of ICC credit regulations. The court explained (804 F.Supp. at 1064):

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[8] A corporate affiliate of Transcon, a bankrupt carrier formerly known as PIE Nationwide, Inc. has filed 30,000 undercharge actions, a number of which involve loss of discount claims. One such case is pending before the ICC on referral by the district court. *Fidelcor Business Credit Corp. v. Dillard Department Stores*, 1992 Fed. Carr. Cas. (CCH) ¶ 83,753 (M.D. Fla. 1992)

> To hold as the court did in *Transcon* in effect renders meaningless all the conditions to an extension of credit in 49 C.F.R. 1320-29. The regulations outlined by the ICC pursuant to its granted authority must be complied with before a carrier can invoke a loss-of-discount remedy. Otherwise, the ICC is stripped of authority as granted by Congress in the Interstate Commerce Act.

The Ninth Circuit brushed aside the contrary decisions of the Third and Fifth Circuits, saying they were unpublished and concerned tariff penalty provisions adopted when ICC credit regulations did not permit such penalties. But this distinction makes no sense. Tariffs either supersede regulations or they don't. If loss of discount penalties were formerly unlawful because not permitted by the ICC's prior credit regulations, restrictions on such penalties in the current regulations must also be given effect.

Nothing in this Court's prior decisions precludes trial courts from granting stays to permit the ICC to consider, in the exercise of its primary jurisdiction, whether a carrier's claim for penalty charges in violation of the Commission's credit regulations is an unreasonable practice or results in unreasonable charges. This procedure is entirely consistent with *Reiter v. Cooper* and *Maislin* and should remain available in cases where the ICC does not seek injunctive relief. However, there is no reason for courts and parties to have to go through this procedure in thousands of individual cases if the Commission undertakes to enforce its regulations by means of a court injunction. The injunction procedure, which conserves court, Commission and party resources, is provided for by the Act and by *Commercial Metals*.

CONCLUSION

For the reasons set forth above and in the brief of the Interstate Commerce Commission, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 93-1318

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

INTERSTATE COMMERCE COMMISSION,
Petitioner,
v.
TRANSCON LINES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE LLOYD T. WHITAKER AS TRUSTEE FOR THE ESTATE OF OLYMPIA HOLDING CORPORATION f/k/a P*I*E NATIONWIDE, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT	3
1. P*I*E Discount Tariff	3
2. Application of the P*I*E Tariff	4
3. Dillard Is A Special Case	6
4. ICC Role	7
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. AUTHORITY TO PUBLISH LOSS-OF-DISCOUNT TARIFFS IS NOT DERIVED FROM ICC'S CREDIT REGULATIONS	10
II. THE ICC'S LIQUIDATED-DAMAGES REGULATION FOSTERS DISCRIMINATION IN THEORY AND IN FACT AND IS, THEREFORE, CONTRARY TO LAW	14
III. TWO FILED RATES IS A MYTH	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

A.J. Poor Grain Co. v. Chicago, B. & Q. Ry. Co., 12 I.C.C. 418 (1907) 15
American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) 16
ICC v. Transcon Lines, 990 F.2d 1503 (9th Cir. 1992), *on remand* 9 F.3d 64 (1993) 3
Insurance Company of North America v. Gee, 702 F.2d 411 (2nd Cir. 1983) 16
Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) 15
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) ..... *passim*
Meade Township v. Andrus, 695 F.2d 1006 (6th Cir. 1982) 16
Pearce v. Director, Office of Workers' Compensation Programs, 647 F.2d 716 (7th Cir. 1981) 16
Reiter v. Cooper, —— U.S. ——, 113 S.Ct. 1213 (1993) 10
Security Services, Inc. v. Kmart Corp., 62 U.S.L.W. 4329 (May 16, 1994) 14
Southern Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. 336 (1982) 8, 13
Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609 (1973) 16
Whitaker v. ICC, No. 92-2747 (Bankr. M.D. Fla. June 8, 1992), *aff'd* 161 B.R. 524 (M.D. Fla. 1993) 5
White v. United States, 989 F.2d 643 (3rd Cir. 1993) 5

ADMINISTRATIVE OPINIONS

Nonoperating Motor Carriers—Collection of Undercharges, 8 I.C.C.2d 742 (1992) 5
Payment of Rates & Charges—Penalty For Nonpayment, 4 I.C.C.2d 340 (1988) 12

STATUTES AND REGULATIONS

49 U.S.C. § 10701 9
49 U.S.C. § 10743(b) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

49 U.S.C. § 10762(a) 12
49 U.S.C. § 10763(b) 14
49 U.S.C. § 11903(a) 7
49 C.F.R. 1320 ..... 4, 6
49 C.F.R. § 1320.2(a) 10
49 C.F.R. § 1320.2(c) 10
49 C.F.R. § 1320.2(d) 11
49 C.F.R. § 1320.2(e) 11
49 C.F.R. § 1320.2(f) 11
49 C.F.R. § 1320.2(g) ..... *passim*
49 C.F.R. § 1320.3(c) 15

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae Lloyd T. Whitaker, trustee for the estate of Olympia Holding Corporation f/k/a P*I*E Nationwide, Inc. ("*Amicus*" or "Trustee"), files this brief in support of respondents Transcon Lines, *et al.*[1] P*I*E Nationwide, Inc. ("P*I*E*") was a motor common carrier operating pursuant to authority of the Interstate Commerce Com-

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[1] All parties have consented to the filing of this Brief pursuant to Rule 37.3 of the Rules of this Court. The parties' letters are filed with the Clerk of the Court.

mission ("ICC"). P*I*E filed a Chapter 11 petition under the Bankruptcy Code on October 16, 1990. Its motor carrier operations continued, however, first as a debtor-in-possession and then under the auspices of *Amicus* Lloyd T. Whitaker, appointed Chapter 11 trustee on December 26, 1990. The case was converted to Chapter 7 on March 11, 1991, and *Amicus* was appointed Chapter 7 trustee.

As with most bankrupt motor carriers, the principal asset of P*I*E's estate is its accounts receivable. The receivables consist of "undercharge" claims against former shipper-customers of P*I*E to collect the difference between transportation charges the motor carrier originally billed (and the shipper paid) based on rates not contained in duly filed tariffs and the higher charges the Trustee now properly calculates based on the carrier's applicable filed tariff rate. The estate's receivables also consist of "original charge" claims against former shipper-customers. These claims arise when the shipper fails or refuses to pay all or any portion of the original transportation charges due and owing pursuant to the carrier's original freight bill, correctly calculated on the basis of rates assessed according to the carrier's duly filed tariffs.

"Original charge" claims include suits to collect undiscounted transportation charges resulting from application of the carrier's loss-of-discount tariff provisions for late payment. P*I*E's Trustee has filed such "original charge" claims pursuant to P*I*E's own loss-of-discount tariff provision, similar (but not identical) to the provision the ICC seeks to enjoin the Transcon Lines ("Transcon") trustee from enforcing. The Trustee estimates the P*I*E estate has brought 2200 adversary proceedings in the bankruptcy court to collect original charge claims predicated on the failure of shipper-defendants to pay transportation charges within the time frame specified in P*I*E's duly filed tariffs.[2]

[2] The main bankruptcy cases are jointly administered in Case Nos. 90-4195-BKC-3P7 and 90-4223-BKC-3P7 in *In re Olympia Holding Corporation a/k/a P*I*E Nationwide, Inc., et al.*, pending in the U.S. Bankruptcy Court in the Middle District of Florida, Jacksonville Division. One very important loss-of-discount claim of the Trustee, brought outside the bankruptcy court in the name of P*I*E's principal secured creditor, is pending before the U.S. District Court for the Middle District of Florida, Jacksonville Division, in Case No. 91-953-Civ-J-16, *Fidelcor Business Credit Corp.* v. *Dillard Department Stores ("Dillard")*. *See amici* Health and Personal Care Br. at 23, n.8.

Because most shipper-defendants have asserted P*I*E's alleged failure to comply with ICC credit regulations as a defense to the Trustee's suits to collect the loss-of-discount tariff rate, *Amicus* wishes to present his views to assist this Court in resolving the proper application of the filed rate doctrine to the ICC's credit regulations and its liquidated-damages regulation.

STATEMENT

The Trustee adopts the counterstatement of the case appearing in the brief of respondents, Transcon Lines, *et al.* beginning at page 2. The Trustee does not believe the context in which the loss-of-discount tariff issue arose in *ICC* v. *Transcon Lines*, 990 F.2d 1503 (9th Cir. 1992), *on remand* 9 F.3d 64 (1993), now before this Court, is fairly representative of the different types of loss-of-discount claims in bankruptcy cases. The Trustee offers the following description of the loss-of-discount claims he is pursuing in the P*I*E bankruptcy case to provide a broader perspective within which to evaluate the legal issues presented. Their resolution here will have far-reaching effect on the Trustee's pending late-pay claims proceedings.

1. *P*I*E Discount Tariff.* P*I*E published, effective October 22, 1990, a loss-of-discount tariff provision in its tariff on file at the ICC, ICC Tariff PIEC 107-J, Item 721:

> 1. [D]iscounts . . . shall apply only when tariff charges are paid within a maximum period of sixty (60) calendar days from invoice date.

2. The provisions of this rule do not change in any way the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with I.C.C. regulations, 49 CFR 1320. This rule simply establishes a condition precedent for the application of the special tariff provisions described in Paragraph 1.

Except for the length of time given shippers to pay in order to receive their discount, it is virtually identical to Transcon's.

Like Transcon's tariff, P*I*E's loss-of-discount tariff item adopted as P*I*E's credit term the obligation of all shippers participating in the discount program to pay within the ICC's standard credit period, 15 days from date of delivery. Like Transcon's tariff, P*I*E's tariff item established an express condition precedent to receiving the discount: the shippers must make full payment of the discounted transportation charges within a specified number of days after the invoice date—60 days in P*I*E's case, 90 days in Transcon's—in order to be eligible to receive the discount.[3] Like Transcon's tariff, P*I*E's loss-of-discount tariff item was duly filed with the ICC, fully complied with the ICC's credit regulations and liquidated-damages regulation, and was never suspended, investigated, or canceled by the ICC.

2. *Application of the P*I*E Tariff.* From October 22, 1990 until P*I*E terminated all motor carrier operations at the end of December, 1990, thousands of P*I*E's customers shipped their freight as participants in the P*I*E discount pricing program, subject to the loss-of-discount penalty provision. During this period, P*I*E scrupulously

[3] The discount is available even to those shippers not paying within the standard credit period of 15 days as long as they pay within the 60-day or 90-day period prescribed in P*I*E's or Transcon's valid tariff.

administered the terms of its discount tariff and the ICC's liquidated-damages regulation. Unlike Transcon, P*I*E imprinted all of its original freight bills (invoices) with the notation: "FULL CLASS RATES WILL APPLY IF PAYMENT NOT RECEIVED IN 60 DAYS." The majority of the shippers paid the discounted transportation charges within 60 days of the original invoice date, if not within the standard credit period. Unlike Transcon, P*I*E timely rebilled all those that did not pay within 60 days,[4] removing their discounts and rerating their shipments at full class rates. Many of these delinquent shippers paid the rerated freight bills in accordance with P*I*E's loss-of-discount tariff provision. The Trustee has pursued all 2200 former customers that did not pay, filing adversary proceedings in bankruptcy court to collect the full class rates.[5] Virtually all the shipper-defendants in

[4] The only known exception was Dillard Department Stores. *See supra*, at 2, n.2 and discussion *infra*.

[5] While the ICC is not currently a party to any of these adversary proceedings, the ICC has been actively involved in the P*I*E bankruptcy case for the express purpose of obstructing the Trustee's collection efforts. For example, the agency's General Counsel is aiding shippers' collective defense strategies through his membership on the Shippers Defense Group Steering Committee, an *ad hoc* coterie of counsel volunteering to coordinate defense efforts in hundreds of the Trustee's cases the district court has now withdrawn from the P*I*E bankruptcy court case. It initiated an agency "show cause" proceeding against the Trustee in ICC Docket No. 40785 designed to halt his collection of certain types of undercharge claims. The bankruptcy court enjoined the continuation of that proceeding in *Whitaker* v. *ICC*, Adv. No. 92-2747 (Bankr. M.D. Fla. June 8, 1992), *aff'd* 161 B.R. 524 (M.D. Fla. 1993). It issued a blanket rule purportedly applicable to all trustees prohibiting the collection of any undercharge claim or loss-of-discount claim without first obtaining ICC permission. Ex Parte No. MC-208, *Nonoperating Motor Carriers—Collection of Undercharges*, 8 I.C.C. 2d 742 (1992). The Third Circuit, at the request of the Trustee and others, set aside the ICC rule "as in excess of statutory authority." *White* v. *United States*, 989 F.2d 643 (3rd Cir. 1993).

pending adversary proceedings are searching for technical violations of the ICC's liquidated-damages regulation, 49 C.F.R. § 1320.2(g), as the means to avoid their obligations to comply with P*I*E's loss-of-discount tariff.

3. *Dillard Is A Special Case.* *Dillard* represents a unique case for P*I*E. The defendant in that case, Dillard Department Stores ("Dillard"), is a member of one or more of the large-shipper organizations supporting the ICC as *amici* in this proceeding. On November 7, 1990, P*I*E had an extraordinarily deep discount published for Dillard's account, a 57 percent discount from the applicable class rate, but made it subject to Item 721, the loss-of-discount liquidated-damages provision of P*I*E's tariff, PIEC 107. Over a two-month period, Dillard ran up a bill of $508,939 in so-called Item 721 discounted freight charges, while refusing to pay any portion of it.[6] Dillard officials had made the corporate decision to continue using P*I*E motor carrier services without paying a dime for them.[7] Dillard had actual knowledge of the loss-of-discount provision, specifically requesting and receiving a copy of that published tariff item from P*I*E. As Dillard's delinquency reached 60 days, P*I*E began rerating each of Dillard's past-due freight bills, but at the private request of Dillard, agreed not to post them immediately. Without notifying the ICC, Dillard persuaded P*I*E not to mail the rerated bills to Dillard, ostensibly to allow Dillard representatives time to negotiate a settlement of the amount due. When negotiations broke down after several months, P*I*E mailed the rerated bills, albeit in many instances a month or more after expiration of the 90-day period specified in the ICC's liquidated-damages

[6] During this two-month period, P*I*E operated under the protection of Chapter 11 of the Bankruptcy Code.

[7] Dillard contends its corporate actions were in retaliation for receiving a check from P*I*E in the amount of $14,000 which, when presented to the bank for payment, was returned for insufficient funds.

regulation, 49 C.F.R. § 1320.2(g)(2)(iv).[8] Dillard still refused to pay any portion of the bill—either the original charges or the loss-of-discount penalty. The lawsuit followed, brought in the name of P*I*E's principal secured creditor, Fidelcor Business Credit Corp. ("Fidelcor"). *See supra* at 2, n.2. Despite the non-compliance defenses raised by the P*I*E Trustee's shipper-defendants, the Trustee is unaware of any other instance in which P*I*E failed to comply with any aspect of the ICC's liquidated-damages regulation in the process of enforcing its loss-of-discount tariff item.

4. *ICC Role.* Dillard and hundreds of other shipper-defendants have complained that P*I*E failed to comply with each and every double-notice, double-mailing time provision technically required under 49 C.F.R. § 1320.2(g)(2). But such technical violations, if any, are simply not of the same magnitude of wrong as Dillard's obstinate (and admitted) refusal to pay the original transportation charges it owes P*I*E, a lapse the ICC has allowed to go unpunished. In April 1993, Fidelcor, P*I*E's principal secured creditor, complained to the ICC in formal pleadings about Dillard's adamant refusal to pay the uncontested original transportation charges of more than $500,000. Fidelcor asked the ICC to institute civil or criminal action against Dillard under the Elkins Act, 49 U.S.C. § 11903(a), for its felonious conduct.[9] Instead, the ICC has merely winked at Dillard's blatant misconduct, a violation of not only the Elkins Act, but also the ICC's own so-called credit regulations. The ICC has taken no action to date, failing even to acknowledge Fidelcor's complaint on behalf of the P*I*E estate.

[8] The number of instances remains in dispute between the parties.

[9] This request came in response to Dillard's own complaint filed with the ICC seeking a ruling to stymie Fidelcor's efforts to collect P*I*E's loss-of-discount penalty from Dillard because of alleged credit-rule violations. *See supra* at 2, n.2, and *amici* Health and Personal Care Br. at 23, n.8.

SUMMARY OF ARGUMENT

1. The ICC correctly observes that shippers can not assert the carrier's violation of the credit regulations as a defense to the collection of the filed rate, including one mandating loss of discount for late payment. ICC Br. at 5, 20. The Trustee agrees and urges the Court to reaffirm this proposition as announced in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 349 (1982) ("*Commercial Metals*"). Significantly, the ICC's shipper *amici* do not dispute this statement of legal principle.

2. The Trustee does not, however, agree the ICC has statutory authority to enjoin trustees from collecting duly-filed tariff rates, including their loss-of-discount provisions, under the guise of enforcing ICC credit regulations. No such authority is set forth in 49 U.S.C. § 10743(b), the claimed statutory basis for the ICC's credit regulations, or elsewhere. To grant the ICC the injunction it seeks would be to graft an exception onto the filed rate doctrine. No express statutory basis exists for such an exception. Allowing the ICC to declare the loss-of-discount penalty uncollectible, leaving the carrier free to collect only its discount rate, truncates the terms of a duly filed tariff; it bars the carrier from enforcing the tariff's loss-of-discount condition. The filed rate doctrine prohibits such piecemeal construction.

3. The discriminatory attributes of the liquidated-damages regulation of the ICC, 49 C.F.R. § 1320.2(g), are fundamentally in conflict with the statutory restriction prohibiting discriminatory credit regulation in 49 U.S.C. § 10743(b). Since the alleged source of the ICC's power to adopt section 1320.2 is 49 U.S.C. § 10743(b), its adoption is an *ultra vires* act. Section 1320.2(g) imposes highly technical post-delivery requirements on the motor carriers as conditions to collecting their filed rate penalties. These conditions are within the discretionary control of the carriers to satisfy or not satisfy as they see fit, depending upon whether they wish to favor one delinquent shipper over another. As Fidelcor's claim against Dillard illustrates, even the failure to meet a single billing deadline or to include a single disclosure phrase on the invoice creates an opening for the ICC to block collection of the filed-rate penalty and for the shipper to refuse to pay the tariff charges, the full undiscounted rates. The Ninth Circuit quite properly applied the filed rate doctrine to foreclose these possible abuses.

4. The filed-rate doctrine, as interpreted and applied in this Court's decisions in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) ("*Maislin*"), and its progeny, forecloses the ICC from enforcing the liquidated-damages regulation through court injunction so as to override the carrier's obligation to collect the filed rate published in a tariff that fully complies with that regulation. Neither does *Maislin* lend support to the argument the ICC and the shipper *amici* advance that the dollar component of the discounted rate constitutes a separate, self-contained filed rate and therefore Transcon's trustee commits an "unreasonable practice" under 49 U.S.C. § 10701 when he attempts to collect the higher undiscounted rate. The actual dollar amount of the discounted rate standing alone is not a filed rate. Rather, an integral term of the "rate" is that a lower dollar amount applies if and only if the transportation charge is paid within a specified period of time. If that period passes without payment, enforcement of the filed rate doctrine requires collection of the higher, undiscounted dollar amount.

ARGUMENT

I. AUTHORITY TO PUBLISH LOSS-OF-DISCOUNT TARIFFS IS NOT DERIVED FROM ICC'S CREDIT REGULATIONS.

The ICC urges this Court to expand its holding in *Reiter* v. *Cooper*, —— U.S. ——, 113 S.Ct. 1213 (1993), to recognize an exception to the filed rate doctrine, purporting to rely on the ICC's alleged "express statutory authority to obtain an injunction to enforce the Act and the credit regulations." ICC Br. at 17. *See also* ICC Br. at 19 ("The ICC's action enforces regulations that are authorized by the specific statutory prohibition against credit transactions except in accordance with ICC rules, 49 U.S.C. 10743."). This argument must fail not only because no such express authority exists, but also because the statutory provision the ICC seeks to enforce, 49 U.S.C. § 10743(b), is not the source of the liquidated-damage regulation the ICC claims Transcon violated.

49 U.S.C. § 10743(b) authorizes motor carriers to relinquish shipments to consignees without first receiving payment if the carriers comply with ICC relinquishment regulations "governing payment for transportation and services . . . ." Historically, the ICC and Congress have labeled the agency's rules allowing carriers to provide shippers a period of time within which to pay transportation charges as "credit extension regulations." The credit extension regulations of the ICC, now codified at 49 C.F.R. § 1320.2, have four operative components.

First, the regulation permits carriers to extend credit to shippers for a period of 15 days without any tariff filing or other notice (§ 1320.2(c)), but only after the carriers take reasonable steps to ensure the shippers pay within this credit period (§ 1320.2(a)(2) and (a)(3)(ii)(C)). This 15-day "standard credit period" is precisely the credit term Transcon (and P*I*E) elected to impose as the basis for relinquishing possession of freight

before receiving payment of discounted transportation charges. They published this credit term in their respective discount tariffs on file at the ICC even though they were not required to do so. *See* ICC Br. at 6-7, n.7; and *supra* at 3-4. Neither the ICC nor its shipper *amici* contend Transcon violated this credit regulation.

Second, the ICC's credit regulations permit carriers to extend credit to shippers for an additional 15 days beyond the 15-day standard credit period, a total of 30 days, if they do so pursuant to tariff publication (§ 1320.2(d)). Third, the credit regulations authorize carriers to assess by tariff publication "service charges" for extending credit beyond the initial 15-day standard credit period (§ 1320.2(e)(2)) and even beyond the credit period authorized in their tariffs (§ 1320.2(e)(3)). The service charges are the means by which carriers may offset their costs associated with allowing shippers the use of funds during and after the authorized credit period. Transcon (and P*I*E) elected not to extend any credit beyond the initial standard 15-day credit period and not to assess any service charges for extending credit. *See* ICC Br. at 6-7, n.7. Neither the ICC nor its *amici* charge Transcon with violating either of these credit regulations.

Last, the ICC credit regulations authorize motor carriers to publish tariff provisions rewarding shippers with discounts if they pay prior to the end of the carriers' credit periods (§ 1320.2(f)). Transcon (and P*I*E) elected not to publish any early-payment incentives and are not accused of violating this credit regulation.

Even though Transcon is not charged with violating any of the four credit-regulation components, the ICC contends it is nevertheless entitled to an injunction blocking Transcon from collecting its duly filed legal rates because Transcon did not comply with 49 CFR § 1320.2(g). Section 1320.2(g) is not a credit regulation, but a regulation authorizing carriers to recover liquidated damages, pursuant to tariff publication or bill-of-lading inser-

tion, from shippers for failing to pay on time. The liquidated damages are intended to make carriers whole for all their reasonable collection costs. *See* § 1320.2(g)(1). This liquidated-damages regulation has nothing to do with fixing the conditions under which carriers may extend credit to shippers. (Those are found in the preceding subsections (a)-(f) of section 1320.2.) Rather, the liquidated-damages regulation governs the form and timing of the rerated bills the carriers' representatives send out when the terms of the credit period and the additional payment period, extended by tariff, have expired. While the ICC has elected to codify its liquidated-damages regulation as an adjunct to its extension-of-credit regulations, it is not a credit regulation, and the ICC's power to authorize carriers to recover liquidated damages from it is not derived from 49 U.S.C. § 10743(b) at all, but from the more general powers Congress gave the ICC to regulate tariff content, such as those found in 49 U.S.C. § 10762 (a).[10] The Court in *Maislin* held that section 10762(a) is the statutory core of the filed rate doctrine, not a source for creating exceptions to it.

The ICC does not claim it may seek to enjoin the collection of the filed rate in response to a violation of *any* regulation, but only one tied to the credit-extension provisions of 49 U.S.C. § 10743(b).[11] The ICC's position rests principally on this Court's observation in *Commercial Metals* that the ICC has the "power to seek a federal court injunction requiring a carrier to comply with the [ICC's credit] regulations." ICC Br. at 2, 5, 11. But Transcon *has* complied with the ICC's credit regulations;

[10] Moreover, the ICC informally recognized the right of motor carirers to publish loss-of-discount tariff provisions even prior to the date the ICC approved its liquidated-damages regulation. *See Payment of Rates & Charges—Penalty For Nonpayment*, 4 I.C.C.2d 340, 345, n.5.

[11] "The ICC brought this action in district court to enjoin respondents from applying Transcon's loss-of-discount provisions to shippers in violation of the ICC's credit regulations." ICC Br. at 7.

the ICC does not allege Transcon has violated any of the four basic components of the conditions the ICC has imposed—found in subsections (a) through (f) of section 1320.2—on extension of credit. In contrast, in *Commercial Metals* this Court found that Southern Pacific had not complied with the ICC's credit regulations. It had not taken reasonable steps to assure itself the consignee was willing and able to pay the transportation charges within the credit period before relinquishing possession of the freight. The ICC readily recognizes the dichotomy between credit-extension regulations of the type Southern Pacific violated and the liquidated-damages regulation at issue here, but inxeplicably elects to treat them as if they were one and the same or at least as if they emanated from the same statutory source, 49 U.S.C. § 10743(b). ICC Br. at 14.[12] They are not the same, and they do not derive from the same statutory section, despite the ICC's assertion to the contrary.

Section 10743(b) authorizes the ICC to issue only credit extension regulations and only if those regulations prevent discrimination. Not only does the ICC's liquidated-damages regulation impose no conditions for extending credit, but it is also laden with conditions conducive to secret post-delivery discrimination. By deliberately planting a mine-field of time-sensitive collection conditions throughout 49 CFR § 1320.2(g)(2), all placed within the control of carriers, the ICC openly invites carriers to discriminate in favor of particular shippers.[13] By mistake

[12] "Invoking that statutory authority [of 49 U.S.C. § 10743(b)], the ICC has promulgated detailed regulations that govern when a carrier may release goods without payment *and* when it may collect liquidated damages, as compensation for collection expenses . . . . The Commission's regulations, 49 C.F.R. Pt. 1320, contain a variety of requirements that carriers must fulfill to collect liquidated damages." ICC Br. at 14. (Emphasis added.)

[13] For instance, the carrier need only aggregate the balance-due bills, omit certain credit or penalty disclosure phrases on the freight bill, or wait 91 days to mail out revised freight bills in order to

or otherwise, a carrier may, with the secret support or at the insistence of its customer, exploit a technical "credit" violation to allow a class of favored delinquent shippers to retain its full discount while compelling another class of similarly situated shippers to forego its discount—even when both classes pay the charges precisely the name number of days after delivery. As discussed *infra*, discrimination is not merely a hypothetical possibility or a matter of speculation. That agency regulation violates the antidiscrimination mandate of 49 U.S.C. § 10763(b), as well as the essential objective of the filed rate doctrine, to prevent price discrimination. *Maislin*, 497 U.S. at 126.

Unlike the tariff in *Security Services, Inc.* v. *Kmart Corp.*, 62 U.S.L.W. 4329 (May 16, 1994), the filed rate of Transcon, with its loss-of-discount condition, is and remains the duly filed, effective tariff rate irrespective of any regulation violation, and the ICC does not contend otherwise. Significantly, the vast majority of the thousands of shippers P*I*E served pursuant to P*I*E's own loss-of-discount tariff retained full discounts by paying within the allotted 60 days. Most of the shippers that refused or failed to pay on time lost their discounts, reluctantly paying the undiscounted amount once they were rebilled the full class rates, without the necessity of the Trustee filing a lawsuit.

II. THE ICC'S LIQUIDATED-DAMAGES REGULATION FOSTERS DISCRIMINATION IN THEORY AND IN FACT AND IS, THEREFORE, CONTRARY TO LAW.

The ICC brushes off as pure speculation the Ninth Circuit's rationale for upholding the supremacy of the filed rate doctrine over the ICC's so-called credit regulations, ICC Br. at 21, and now urges this Court to allow the

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justify under § 1320.2(g) giving the full discount to non-paying or delinquent favored shippers despite the carrier's published tariff provision requiring full payment within 90 days (or 60 days) in order to be entitled to that discount.

ICC to enjoin carriers from collecting their filed rates (the loss-of-discount penalty) because of credit-regulation violations, yet reaffirm the shippers' inability to rely on these same violations as defenses or counterclaims when sued to collect the same filed rate penalty. The Ninth Circuit refused to embrace this anomalous result because,

> . . . [it] would permit an end-run around the filed rate doctrine. A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would puposely violate various credit regulations such as 49 C.F.R. 1320.3(c), which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only after a carrier goes bankrupt would the illegal discount be brought to light.

3 F.2d at 66-67. The ICC simply dismisses the Court's "speculation" that the ICC would "wink" at the above conduct as an inappropriate basis for holding that the filed rate doctrine trumps the ICC's credit regulations. ICC Br. at 21.

The Court of Appeals was entitled—even obligated—to consider these possibilities when faced with a government request for a blanket injunction, one neither predicated on a single case or controversy nor dependent on the peculiar facts of any specific loss-of-discount claim. Congress deliberately designed the filed rate doctrine to eliminate these possibilities. The doctrine brooks no exceptions under any pretext, including ignorance or intentional misquoting of rates. *Maislin*, 497 U.S. at 127, quoting from *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915). Accordingly, the very real fear of *potential* carrier rate manipulators misquoting rates to favor privileged large shippers led the ICC to insist on strict adherence to the filed rate in *A. J. Poor Grain Co.* v. *Chi-*

cago, B. & O. Ry. Co., 12 I.C.C. 418, 421-22 (1907), quoted with approval in *Maislin*, 497 U.S. at 128, and led this Court to strike down the ICC's negotiated rates policy in *Maislin*.

That the liquidated-damages regulation *promotes* discrimination provides further grounds for the conclusion that its statutory basis can not be found in 49 U.S.C. § 10743(b), the statutory basis for credit regulations. That statutory provision authorizes carriers to extend credit "[u]nder regulations . . . *preventing discrimination* . . . ." (Emphasis added.) Since the liquidated-damages regulation fails to prevent discrimination—in fact, it encourages discrimination—it is contrary to the terms of the statute itself and therefore is an *ultra vires* rule this Court should refuse to enforce in this proceeding. *See e.g., Insurance Company of North America* v. *Gee*, 702 F.2d 411, 414 (2nd Cir. 1983) (holding that regulation inconsistent with authorizing statute is unenforceable: "Regulations promulgated pursuant to rulemaking authority conferred by statute assume the force of law only to the extent consistent with the statutory scheme they were designed to implement."), *citing Pearce* v. *Director, Office of Workers' Compensation Programs*, 647 F.2d 716, 726 (7th Cir. 1981). *See also, e.g., Meade Township* v. *Andrus*, 695 F.2d 1006, 1009-10 (6th Cir. 1982) (holding that regulation inconsistent with governing statute is void: "We could not uphold the regulation in its present form without violating the fundamental principle that all provisions of a statute must be given full effect."), *citing American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 513 (1981), and *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

The P*I*E proceedings, and in particular Fidelcor's suit against Dillard, illustrate that the Ninth Circuit did not engage in idle speculation in raising the spector of discrimination. In fact, the suit against Dillard makes clear just how readily and unfairly the liquidated-damages

regulation can be manipulated to discirminate among shippers of differing economic clout. Ironically, the larger the delinquent amount, the greater the clout.

As explained *supra* at 6-7, Dillard has refused to pay even one penny of the more than $500,000 owed on the original freight charges it accumulated under P*I*E's loss-of-discount tariff. Under the guise of negotiating a settlement of this claim, it persuaded P*I*E to delay sending out the hundreds of re-rated freight bills deleting the discounts until after the 90-day period fixed in 49 C.F.R. § 1320.2(g)(2) for rebilling had passed. Despite actual knowledge of P*I*E's loss-of-discount tariff provision, furnished well before the expiration of the 90-day rebilling deadline, Dillard refused and still refuses to pay anything, brazenly exploiting P*I*E's technical non-compliance with § 1320.2(g)(2), a condition Dillard itself earlier induced.

The discrimination scenario is self-evident; large shippers such as Dillard electing not to pay on time can still receive their discounts if they strike a secret post-delivery deal under which the carrier violates a technical requirement of the liquidated-damages regulation, while less favored delinquent shippers must pay the late-payment penalty in compliance with the carrier's loss-of-discount tariff. Moreover, 3½ years after P*I*E transported Dillard's merchandise, Dillard has yet to pay one red cent, but still claims it is entitled to pay the same discount rate as shippers paying within 15 days of delivery and participating in the same loss-of-discount tariff as Dillard. The tariff provision the Trustee (and Transcon's trustee) seeks to enforce in accordance with its terms prohibits this inequity. Congress intended the filed rate doctrine to do no less.

After more than one year, it may yet be too early to brand the ICC's refusal or failure to take any action to punish Dillard as "winking" at Dillard's misconduct. But, given the passage of time and the position the ICC advocates in the Transcon proceeding, the possibility the

ICC will "go along" with Dillard or at least "look the other way" becomes quite real, unless this Court affirms the decision of the Ninth Circuit.

III. TWO FILED RATES IS A MYTH.

The ICC seeks to bifurcate Transcon's discount tariff, which imposes receipt of payment within 90 days as an absolute condition to receiving the discount, into two distinct parts, treating each part as a separate tariff publishing a separate set of rates. ICC Br. at 12, 17, 26, n.22, 27. This exercise permits the ICC and its shipper *amici* to pretend they ask not that the Court block Transcon from collecting its filed rate, but simply that Transcon collect only its "discount rate" instead of its "full class rate." It is from this brittle stalk that the ICC tries to hang its argument that *Maislin* does not govern Transcon's case and the injunction it seeks does not interfere with enforcement of the filed rate doctrine. *See* ICC Br. at 12, 26-27. *See also* Health and Personal Care Br. at 8-9, 15-17. But neither common sense nor years of interpreting the filed rate doctrine permit the ICC to proffer such a limited definition of the term "rate." A "rate" is not a bare dollar amount. Rather, a "rate" consists of all of the terms which together establish a transportation charge. Transcon's discount pricing program offered its customers one rate, a discount from class rates, but only on the condition they pay within 90 days of invoicing.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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No. 93-1318

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a duly published and effective tariff can be rendered null and void, and a bankruptcy trustee enjoined from collecting undercharge monies from shippers for the benefit of creditors, by the Interstate Commerce Commission's enforcement of its credit regulations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
1. The Ninth Circuit's Decision Prevents Discrimination Amongst Shippers	6
2. The Ninth Circuit's Decision Prevents the ICC From Undermining the Filed Rate Doctrine	9
3. The Ninth Circuit's Decision Upholds the Rights and Interests of Transcon's Creditors	11
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES	
ICC v. All-American, Inc., 505 F.2d 1360 (7th Cir. 1974)	10
ICC v. Transcon Lines, 990 F.2d 1503 (9th Cir. 1992)	11
ICC v. Transcon Lines, 9 F.3d 64 (9th Cir. 1993)	4
ICC v. Transcon Lines, 113 S.Ct. 2955 (1993)	4
Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	5, 7
MCI Telecommunications Corp. v. American Telephone & Telegraph Co., No. 93-356, slip op. (June 17, 1994)	6, 7
Reiter v. Cooper, 113 S.Ct. 1213 (1993)	4
Southern Pacific Transportation Co. v. Commercial Metals, 456 U.S. 336 (1982)	*passim*
STATUTES	
49 U.S.C. § 10741(b)	8
49 U.S.C. § 10761(a)	3, 6
49 U.S.C. § 10762(a)(1)	3, 6
49 U.S.C. § 11702(a)(4)	5, 8
REGULATIONS	
49 C.F.R. § 1320.2(g)(2)(iii)	4
49 C.F.R. § 1320.2(g)(2)(vi)	4
49 C.F.R. § 1320.2(h)	5, 8
49 C.F.R. § 1320.3(c)	4

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The International Brotherhood of Teamsters ("IBT") is a labor union of approximately 1.4 million members, many of whom are employed in some aspect of the motor carrier industry. Transcon Lines ("Transcon"), a respondent herein, operated as a motor common carrier under authority issued by the Interstate Commerce Commission ("ICC" or "Commission") until 1990 when it went bankrupt. The Transcon bankruptcy resulted in hundreds of IBT members losing their jobs. In addition, when Transcon went into bankruptcy it owed its employees and their

pension funds millions of dollars. Indeed, Transcon's former employees and their pension funds are the largest creditors of the Transcon estate.[1]

The undercharge claims herein at issue brought against shippers by Transcon's trustee are the estate's major, if not only, asset and the collection of these claims thus represents the only hope which these former employees have of recovering any portion of the monies they are owed. As shown below, the shippers, which include some of the largest companies in the country, failed to pay the freight charges provided for in lawful tariffs published by Transcon and filed with the ICC. Their actions contributed to Transcon's financial problems and its ultimate demise. Now, with the assistance of the ICC, they are fighting against the trustee's collection efforts which have been undertaken on behalf of innocent creditors. On behalf of Transcon's former employees and other similarly situated creditors of other bankrupt motor carriers, the IBT is participating herein as *amicus curiae* in support of the respondents.

[1] Former employees are owed more than $23 million in back wages, severance and vacation pay. A copy of the proof of claim filed on behalf of Transcon's former employees was attached as Appendix A to the IBT's brief in support of the Respondents in Docket No. 92-1547. Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 1a-6a. The Central States, Southeast and Southwest Areas Pension Fund is owed almost $16 million by Transcon. See Appendix B to IBT's brief in support of the Respondents in Docket No. 92-1547. Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 7a-9a.

STATEMENT

This case involves misguided efforts by the ICC to prevent Transcon's trustee in bankruptcy from recovering freight charges owed by shippers who failed to pay filed tariff rates as required by the Interstate Commerce Act.[2] Transcon's duly filed and published tariff provided shippers a discounted rate if they paid freight charges within 90 days of shipment. Failure to pay within the 90 days resulted in the application of otherwise published non-discount rates.[3] There is no dispute regarding the clarity of this "loss of discount" provision, nor has any party raised a question as to it being properly filed with the ICC.

After Transcon went into bankruptcy, an audit of its records showed that, notwithstanding the tariff's unambiguous terms, many shippers had paid (or were seeking to pay) discount rates long after the 90-day period had elapsed. On behalf of creditors of the estate, the trustee has attempted to recover the applicable undercharges from the shippers, *i.e.*, the difference between the discount and non-discount rates. The ICC has sought to

[2] The duty of a carrier to collect and a shipper to pay filed tariff rates, sometimes referred to as the "filed rate doctrine", has and continues to be a clear requirement of the Interstate Commerce Act. 49 U.S.C. §§ 10761(a) and 10762(a)(1).

[3] Transcon's tariff provided in pertinent part:

1. [D]iscounts * * * shall apply when tariff charges are paid within 90 calendar days from date of shipment.
2. * * * This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

enjoin the trustee from collecting these undercharges on the basis that Transcon failed to comply with the Commission's credit regulations.[4]

This case has been before this Court once before at which time it granted certiorari and remanded for further consideration in light of its decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). *See ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993). On remand the court of appeals concluded that its earlier decision was in complete accord with this Court's holding in *Reiter*. *ICC v. Transcon Lines*, 9 F.3d 64 (9th Cir. 1993). Thereafter the ICC filed a petition for a writ of certiorari and the Court granted certiorari on April 18, 1994. ICC Br. at 1-2.[5]

SUMMARY OF ARGUMENT

On remand, the Ninth Circuit correctly held that its earlier decision, in which it found that a failure to comply with certain technical ICC credit regulations did not prevent the trustee from collecting Transcon's filed tariff rate, is consistent with this Court's decisions in *Reiter*, *Southern Pacific Transportation Co. v. Commercial Metals*,

[4] The ICC has alleged that Transcon's original bills did not advise shippers of the consequences of late payment, in violation of 49 C.F.R. 1320.3(c); revised bills were not issued until after the 90-day period provided for in 49 C.F.R. 1320.2(g)(2)(vi); and the trustee sought to apply the loss-of-discount provision on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii).

[5] Citations to the Brief for the Petitioner are referred to as "ICC Br. at ___."

456 U.S. 336 (1982) and *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

If Transcon's loss of discount provisions are voided, all shippers that transported cargo with Transcon would receive the discounted rate regardless of whether they had paid their freight charges within the required 90 days. As a result, those shippers who had paid their freight charges within 90 days would be prejudiced vis-a-vis those shippers who chose to ignore the 90-day requirement. The filed rate would be negated in that the published condition precedent for application of the discount rate, i.e., payment within 90 days, would be ignored. Adopting the ICC's position would in fact sanction the type of discriminatory conduct that the Commission's credit regulations expressly prohibit (49 C.F.R. § 1320.2(h)) and would also sanction the ICC's use of its injunctive powers in a discriminatory manner in clear violation of the Interstate Commerce Act. See 49 U.S.C. § 11702(a)(4).

The ICC's efforts to enjoin Transcon's trustee from collecting the filed rate flies in the face of this Court's decision in *Commercial Metals*, and its efforts to avoid the plain language of *Commercial Metals* fall short of the mark. Further, the collection of the filed rate will not benefit Transcon as the Commission and its amici have argued. Rather, all monies collected will in some part fund the claims of Transcon's unsecured creditors. The equities of this case, as the Ninth Circuit has recognized, are not with the shippers that have violated Transcon's tariff, but rather rest with Transcon's innocent unsecured creditors who have borne the greatest loss.

ARGUMENT

1. The Ninth Circuit's Decision Prevents Discrimination Amongst Shippers.

The ICC argues that its efforts to enjoin the collection of the non-discounted rate would not undermine the filed rate doctrine because the trustee would still be able to collect the filed discounted rate and interest charges "due upon delivery". ICC Br. at 12 and 26-27. The ICC also characterizes the non-discounted rate as merely "a liquidated damage provision" or "collection charges" for failure to meet the credit terms and thus the failure to apply the non-discounted rate will not "interfere" with the filed rate doctrine at all. ICC Br. at 27. This characterization ignores the plain and unambiguous language of the tariff. While it is perhaps understandable why the ICC would advocate such a position, express terms of a tariff cannot be so cavalierly set aside. The discounted rate offered by Transcon was available only if payment was made within the 90-day period specified. Shippers were, in effect, given an incentive to pay within this time period. Once the time elapsed, the discounted tariff rate no longer was applicable. To apply that discounted rate in a manner that contradicts the terms governing such rate would violate Transcon's tariff and the filed rate doctrine which requires strict adherence to published tariff terms and conditions. 49 U.S.C. §§ 10761(a) and 10762(a)(1). See also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, No. 93-356, slip op. at 12 (June 17, 1994).

As the Court has repeatedly held, the filed rate doctrine is "utterly central" to the administration of the Interstate Commerce Act and without it, it would be

"monumentally difficult to enforce" the statute's non-discriminatory and reasonableness requirements. *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 110 S.Ct. at 2769; *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 343-344; *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, No. 93-356, slip op. at 12 (June 17, 1994). Here, the ICC is seeking to enjoin the collection of the applicable rate by labelling a fundamental portion of Transcon's tariff as merely "collection charges." The fact is, no matter what the non-discounted tariff rate is called, Transcon's tariff specifically provided that if the shipper did not pay within 90 days of shipment it would be required to pay the non-discounted tariff rate.

Refusing to enforce Transcon's loss of discount provisions – the filed rate – would not only be contrary to the filed rate doctrine, but it would also run afoul of the well-established principle that enforcement of tariff terms is required to prevent discrimination between shippers.

> This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act – to achieve uniformity in freight transportation charges, and thereby to eliminate . . . discrimination and favoritism . . . .

Southern Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. at 344. See also, *Maislin*, 110 S. Ct. at 2766; and *MCI Telecommunications Corp.*, slip op. at 12. Here, if the Commission's arguments prevail and Transcon's loss of discount provisions are voided, discrimination would occur because all shippers utilizing Transcon's services would receive the discounted rates, regardless of when the freight charges were paid. Shippers who paid in more than 90 days would be given preferential treatment by

being granted the same terms as shippers who paid in less than 90 days. This is exactly what the Transcon tariff and the ICC's credit regulations were intended to prevent. Indeed, the ICC's regulations pertaining to loss of discount provisions specifically provide that:

> Tariff rules published pursuant to paragraphs (a), (c) and (j) of this section shall not result in unreasonable discrimination among shippers.

49 C.F.R. § 1320.2(h). Furthermore, Congress specifically provided that:

> A common carrier . . . may not subject a person . . . to unreasonable discrimination

49 U.S.C. § 10741(b). Notwithstanding these clear statutory and regulatory pronouncements, the ICC now chooses to ignore the discriminatory consequences of its arguments and thereby unduly prefer late-paying shippers.

Not only do the ICC's own credit regulations prohibit discrimination among shippers, but, as the ICC concedes, Congress specifically prohibited the Commission from using its injunctive powers "under a provision of this subtitle governing the reasonableness and discriminatory character of rates." 49 U.S.C. § 11702(a)(4). ICC Br. at 13. Since the injunction being sought by the ICC would cause discrimination to occur, its action herein against the trustee cannot be permitted.

2. The Ninth Circuit's Decision Prevents the ICC From Undermining the Filed Rate Doctrine.

The Commission's efforts to enjoin Transcon's trustee from collecting the filed rate are contrary to the Court's holding in *Commercial Metals*. In *Commercial Metals*, the Court stated as follows:

> [t]he carrier's . . . violation of the credit regulations are insufficient . . . to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) will estop or preclude it [the carrier] from enforcing payment of the full amount by a person liable therefor."

Commercial Metals at 352 (citations omitted). Notwithstanding the holding of *Commercial Metals*, the ICC maintains that Transcon's violations of the credit regulations preclude it from collecting the filed rate. In seeking to avoid the conflict with the holding of *Commercial Metals*, the Commission relies upon the Court's observation that the ICC has the authority "to seek a federal court injunction requiring a *carrier* to comply with the [credit] regulations." *Commercial Metals* at 349 (citations omitted) (emphasis added). The ICC's reliance upon this statement is misplaced and cannot support an injunction prohibiting the trustee from pursuing to collect duly owed tariff charges from shippers. In this regard, the injunction being sought in no way seeks to enforce Transcon Lines' compliance with the regulations. Indeed, this cannot possibly be done since Transcon Lines ceased operating in July of 1990. Rather, the Commission is seeking to impose a forfeiture of the filed rate on the trustee representing Transcon's creditors.

The ICC's injunctive powers as described in *Commercial Metals* were not intended to encompass actions which would preclude enforcement of the filed rate. The holding in *Commercial Metals* was just the opposite; the filed rate must be paid notwithstanding non-compliance with credit regulations. *Commercial Metals* at 352. The injunctive authority contemplated by the Court in *Commercial Metals* is the type of action involved in *ICC v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974). In *All-American*, which was cited and relied upon by the Court in *Commercial Metals*, the Seventh Circuit upheld the ICC's use of its injunctive powers to prohibit All-American, Inc. "from extending credit to shippers who it knows, or should know, will not pay its tariff charges within a seven day period . . . " Id. at 1361. There was absolutely no mention of voiding the carrier's filed rate in *All-American*.

Neither the Seventh Circuit in *All-American* nor the Supreme Court in *Commercial Metals* authorized the ICC to use its injunctive powers to abolish the filed rate where a carrier violated its credit rules. Yet this is precisely what the ICC is seeking to do in the instant matter. The ICC's unilateral expansion of its injunctive powers to circumvent the core holding of *Commercial Metals* is meritless and should be rejected as such.[6]

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[6] The Commission has also argued that unless it is entitled to enjoin Transcon's trustee from collecting the filed rate, it will be unable to enforce the credit regulations since the alternative remedies are neither "logical nor effective against a bankrupt carrier . . . " ICC Br. at 23. This reasoning ignores the fact that voiding the filed rate will not punish Transcon or deter Transcon from further violating the credit regulations. Transcon has ceased to exist. All that remains are the interests of Transcon's unsecured creditors. Punishing these innocent creditors will not achieve any of the goals of the credit regulations. Accordingly, the IBT's efforts are not only misdirected they also are inequitable.

3. The Ninth Circuit's Decision Upholds The Rights and Interests of Transcon's Creditors.

In their efforts to slant the equities of this case in their favor, the ICC and its supporting amici would have this Court believe that the collection of the filed rate is the final element in an elaborate trap that was masterminded by Transcon. ICC Br. at 16.[7] Accordingly, the ICC and its supporters contend that *Transcon* should not benefit from collecting the filed rate from *innocent* shippers where Transcon did not comply with the ICC's credit regulations. In doing so, the ICC asks this Court to ignore the plain consequences of this proceeding, namely, that any amounts collected would go to Transcon's unsecured creditors not to Transcon.

The Ninth Circuit recognized the realities of this case in its earlier decision when it concluded:

> The equities here are not necessarily with the late-paying shippers. They enjoyed an extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors.

ICC v. Transcon Lines, 990 F.2d 1503, 1515 (9th Cir. 1992). Far from being innocent, these shippers wilfully declined

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[7] Brief of the Health and Personal Care Distribution Conference, Inc., the National Industrial Transportation League and the National Small Shipments Traffic Conference, Inc. at 10.

to pay discounted freight charges within the published 90-day period. They took improper advantage of Transcon's extension of credit. As a result, Transcon's cash flow was severely jeopardized and it was forced into bankruptcy. Hundreds of people were put out of work. It is these employees together with Transcon's other unsecured creditors that would recover part of the monies owed to them if the filed rate is collected. Transcon would gain nothing.

As a matter of law and equity, the late-paying shippers should not be allowed to escape their obligations under Transcon's filed rate to the detriment of Transcon's innocent creditors.

CONCLUSION

For the foregoing reasons the Ninth Circuit's decision should be affirmed.

Respectfully submitted,

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